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The Duchess of Kingston.

Trial of
The Duchess of Kingston

Edited by

Lewis Melville

AUTHOR OF "REGENCY LADIES," "MAIDS OF HONOUR,"
"THE STAR OF PICCADILLY"



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P R E F A C E.

THE material for a biographical introduction to this volume of the Notable Trials Series is not so considerable as might be expected, when the notoriety of the lady in question is taken into account. She was no correspondent, and the letters she received have not been preserved.

There have been several books of which she has been the central figure:—

“Les aventures trop amoureuses, où, Elisabeth Chudleigh, ex-Duchesse Douairière de Kingston, Aujourd’hui Comtesse de Bristol, et la Marquise de la Touche sur la scène du monde. Avec d’autres Anecdotes pour servir d’instructions à ceux qui en ont besoin et d’amusemens aux autres. A Londres, aux dépens des intéressez. MDCCLXXVI.”

“An Authentic Detail of Particulars relative to the late Duchess of Kingston London. Printed for G. Kearsley, at Johnson’s Head, No. 46, Fleet Street. MDCCLXXXVIII. Price, Three Shillings and Sixpence.” This biography is an elaboration of the obituary notice which appeared in the *Scots Magazine*, vol. 50, 1788.

“Authentic Particulars of the Life of the late Duchess of Kingston during her connection with the Duke, her Residence at Dresden, Vienna, St. Petersburg, Paris, and several other Courts of Europe; also, a faithful copy of her Will. London: Printed for J. Barker, Dramatic Repository, No. 19 Great Russell Street, Covent Garden. (Price, three shillings and sixpence.)” This work is undated, but it is believed to have been published in 1788. The “New Edition, with considerable additions,” probably appeared in 1789.

“The Life and Memoirs of Elizabeth Chudleigh, afterwards Mrs. Hervey and Countess of Bristol; commonly called Duchess of Kingston. Written from authentic information and original documents.” This also is anonymous. This quarto volume has

a "Note," dated 1st October, 1788, and was published by R. Randall at one shilling and sixpence.

"The Life and Memoirs of Elizabeth Chudleigh, afterwards Mrs. Hervey and Countess of Bristol; commonly called Duchess of Kingston." This octavo volume is, in spite of the title, different from the above, and was published in 1789 by H. Chamberlaine, G. Burnet, L. White, P. Byrne, H. Colbert, and J. Halpen.

"Original Anecdotes of the late Duke of Kingston and Miss Chudleigh, *alias* Mrs. Hervey, *alias* Countess of Bristol, *alias* Duchess of Kingston, interposed with memoirs of several of the nobility and gentry now living. Written in a series of letters to a gentleman, by Thomas Whitehead, many years servant to the Duke of Kingston, and now musician at Bath. 1792." The author, who had been valet to the Duke, says that the letters which make up the volume were written at the desire and for the amusement of "a particular friend." He goes on to explain—"The author having, since he left the service of the Duke, been much reduced both in health and circumstances, was advised to publish them as a means of adding to the little he now gets by his profession. He was encouraged in this idea by the rapid sale of a book entitled 'Authentic Memoirs,' containing but a collection from old newspapers and magazines. However, he would never have troubled the world with the present publication, but for some disappointments and ill-treatment he experienced . . . Thus candidly confessing the motives that induced him to appear in print, he relies on the public for protection, acknowledging his incapacity as an author, but assuring them, that, as this is the first, so it shall be the last, time of his appearance in that character." A perusal of the "Original Anecdotes" recalls Goethe's comment on the saying, "No man is a hero to his valet"—not because the hero is not a hero, but because the valet is a valet. The book is vulgar, spiteful, and inaccurate. If you will believe Whitehead, you will believe anybody.

The official report of the trial is, of course, that "Published by order of the House of Peers." There are other accounts in Howell's "State Trials" (vol. xx., 1814), "The Kingston Cause Impartially Stated" (1776), and in the "Malefactors' Register."

First-hand information about Elizabeth Chudleigh is to be found in the correspondence of Horace Walpole and Lady Mary Coke; and there is mention of her in the letters of Mrs. Elizabeth Montagu, Lady Jane Coke, Lady Mary Wortley Montagu, Mrs.

Delany, and Hannah More; in the diaries of Lord Hervey; in Martin Sherlock's "Letters of an English Traveller," in the "Memoirs of Major Semple," and in the "Annual Register." There are allusions to her in Bray and Manning's "History of Sussex" (1804), Faulkner's "History of Chelsea" (1810), Thomas Wright's "Caricature History of the Georges" (1848), W. J. Thom's "Hannah Lightfoot" (1867), Tom Taylor's "History of Leicester Square" (1874), and other works. In the reports of the Historical Manuscript Commission there is only one letter about her, and in *Notes and Queries* nothing of importance.

There are sketches of Elizabeth Chudleigh in J. H. Jesse's "Memoirs of the Court of England" (1843) and J. Fitzgerald Molloy's "Court Life under the Georges" (1882). The account in the "Dictionary of National Biography" is by William Hunt. In 1911 appeared a full-dress biography by Charles E. Pierce.

It is thought that the career of Elizabeth Chudleigh suggested to Thackeray the characters of Beatrix in "Esmond" and the Baroness Bernstein in "The Virginians."

LEWIS MELVILLE.

LONDON, *December* 1927.

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THE DUCHESS OF KINGSTON.

INTRODUCTION.

I.

ELIZABETH CHUDLEIGH was the daughter of Colonel Thomas Chudleigh, second son of Sir George Chudleigh, Bart., of Ashton, County Devon, and Harriet, daughter of another Chudleigh, who lived at Charlington, County Dorset. Her father held the comfortable residential post of Lieutenant-Governor of the Royal Hospital, Chelsea; but it is not known whether she was born there or on the little family estate or farm called Hall, in the parish of Hartford, about 12 miles from Plymouth. The birthplace is immaterial; of more interest is the date of her birth, but even the actual year is unknown. One of her biographers gives it as 1730, but, as her father had then been dead for four years, this can be ruled out. In the evidence of one witness at the trial there is a statement that Elizabeth was eighteen at the time of her marriage, which would make the date 1726: to this there is the objection that she would only have been fourteen when she was appointed a Maid of Honour to the Princess of Wales. "They [the prosecution at the trial]," Horace Walpole wrote to Sir Horace Mann in 1776, "favoured her age as much as her person on the trial, for they made her out fifty, whereas she must be fifty-five or fifty-six. She and her brother were my play-fellows when we lived at Chelsea, and her father was Deputy-Governor of the hospital. I am fifty-nine almost, and boys and girls do not play together unless near of an age, much less before one of them is born. I believe you remember them at Chelsea as well as I."

The year 1720 is that which finds most support, and, for the purpose of this Introduction, it may be left at that.

It has been said that Colonel Chudleigh lost most of his fortune in the South Sea Bubble: anyhow at his death he left his family in poor circumstances, and the widow, with her little daughter, went to live in inexpensive seclusion at Hall, pos-

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session of which, in spite of the financial disasters, had been retained. The girl grew up with a minimum of education, and the few letters of hers that have been preserved were probably not entirely her composition. Even in these early days she had plenty of intelligence, and she unquestionably had a keen sense of self-preservation. There is no doubt that already she was very beautiful, though no description of her appearance is known to exist; she was particularly fortunate in that the attack of smallpox which she had at the age of fifteen did not in the least affect her looks.

For several years in the life of Elizabeth Chudleigh there is nothing to rely upon except tradition. There is a bald statement that she had her first serious love affair shortly after her recovering from her illness, but of this nothing is actually known. There is, however, convincing evidence that presently William Pulteney, who saw her when he was shooting in the neighbourhood of Hall, was greatly attracted. He was then over fifty years of age, held a seat in the House of Commons, and was a distinguished Whig politician. He had talent, charm no doubt, and had been married for at least a score of years. The story goes that he contrived an introduction to Mrs. Chudleigh, and became a frequent visitor to Hall. Soon after he undertook to supply the deficiencies of the education of the girl. That is to say, according to the lady's earliest biographer, they secluded themselves for hours, while he read to her and she read to him. "This intimacy, notwithstanding the difference of age between the parties," remarks the same authority, "was not considered by all as being strictly platonic." In view of Elizabeth's later life, probably no injustice is being done in not giving her the benefit of the doubt. A wealthy, polished, experienced lover was probably even then to her taste. Anyhow, Pulteney, who it must be assumed was still enamoured, carried her off to London, taking with them for the sake of appearances—for which otherwise they had little regard—her apparently complaisant mother. Again, the date is doubtful; it has been put down as 1740, but the accounts vary. Let it go that when the girl was twenty, or in 1743, when she was twenty-three, Pulteney (who had been created Earl of Bath) secured for her the post of a Maid of Honour to Augusta, consort of Frederick, Prince of Wales, at a salary

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of £400 a year. Having thus, at little or no expense to himself, provided for her, he made her a bow and passed out of her life.

The Court of George II. was not immaculate—for years the respectable and sedate Mrs. Henrietta Howard, the King's mistress, was one of the most important persons there; but the atmosphere of Leicester House, where lived Frederick, Prince of Wales, was entirely vicious. The chief passion of the Heir-Apparent was woman, and, unlike his father and his grandfather, he liked her beautiful. When Elizabeth Chudleigh took up her appointment there, she found a large harem. It may be assumed that this did not offend her modesty.

Among the suitors of Elizabeth Chudleigh in 1743 was James, sixth Duke of Hamilton, who had just succeeded to the title. He was nineteen years of age, and was about to make the grand tour, without which in the eighteenth century no gentleman's education would possibly be regarded as complete. He might not, therefore, abandon his travels; but he begged the young lady to promise to marry him on his return, or, if his guardians forbade, when he came of age. This was, indeed, a great "catch" for Elizabeth—here was great rank and vast wealth. It would have been enough to turn the head of most girls; Elizabeth was no doubt pleased enough at the prospect, but not unduly so; she may have remembered that there's many a slip . . .

Soon after the departure of the Duke, Elizabeth, while staying with her aunt, Mrs. Hanmer, at the house of her cousin, by marriage, John Merrill, of Lainston, Hampshire, went to the Winchester Races, and there met the Hon. Augustus John Hervey, second son of Baron Hervey of Isleworth, who had married beautiful "Molly" Lepel, and grandson of John Hervey, first Earl of Bristol of the second creation. Hervey, who was born in 1724, at once fell madly in love with her, and, after a brief courtship, married her. The reason why she married him can only be explained by the fact that she, too, was infatuated, for Hervey, though well connected, was poor and had no particular prospects. Those who argue that she married him in a fit of pique because she thought that the Duke of Hamilton had deserted her would appear to ignore the fact that if she had only wished to get married she could most certainly have found a more eligible

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parti. It is worth noting that the Duke had written to her more than once, but the letters miscarried—at least, they did not reach her. It has been suggested that they were intercepted by Mrs. Hanmer, who supported Hervey's suit.

Anyhow, Hervey, who was a lieutenant in the Navy, obtained short leave of absence, and was married privately at Lainston Church at eleven o'clock on the evening of 4th August, 1744, the ceremony being performed by the incumbent, the Rev. Thomas Amis. The witnesses were Mrs. Hanmer, John Merrill, and Ann Cradock, Mrs. Hanmer's maid, and one Mountenay, a friend of Merrill. The reason for secrecy was that, owing to the young couple's lack of means, the bride had decided, anyhow so long as her husband was on foreign service, to retain her post at Leicester House, which, as a married woman, she could not have done. A few days later Hervey embarked at Plymouth to join his ship "Cornwall," then the flagship of Vice-Admiral Davers, on the Jamaica station.

According to the author of "Authentic Particulars of the Life of the late Duchess of Kingston," published just after the death of the lady in 1788, the marriage was a failure from the start—"There is a compliment to the dead"—in this case meaning Hervey, who had been in his grave for nine years—"exacted by usage; conformably to which we treat their names with reverence, whose deeds deserve the severest reproach. On this principle it can only be said that the connubial rites were attended with consequences, injurious to health, as well as unproductive of fecundity; and that, from the night following the day on which the marriage was solemnised, Miss Chudleigh resolved never to have further connection with her husband. To prevail on him not to claim her as his wife required all the art of which she was mistress. The best dissuasive argument was the loss of her situation as Maid of Honour, should the marriage be publicly known. The finances of Captain Hervey not enabling him at the time to compensate such a loss, most probably operated as a prudential motive for his yielding to the entreaties of his wife. He did so yield; but in a manner which at times indicated a strong desire to play the tyrant."

As against this there is the evidence of Ann Cradock, given at the trial—

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By the SOLICITOR-GENERAL—Did you attend on the lady, Mrs. Hervey, as her maid?—I did at the time, her own not being able.

After the ceremony, did you see the parties in bed together?—I did.

By a LORD—Repeat what you said.—I saw them put to bed; I also saw Mrs. Hanmer insist on their getting up again.

By the SOLICITOR-GENERAL—Did you see them next morning?—I saw them that night afterwards in bed, the same night after Mrs. Hanmer went to bed.

Did you see them afterwards in bed for some nights after that?—I saw them particularly in bed the last night Mr. Hervey was there, for he was to set out in the morning at five o'clock; I was to call him at that hour, which I did; and, entering the chamber, I found them both fast asleep; they were very sorry to take leave.

Hervey returned to England in October, 1746, when it is said he stayed with his mother-in-law at her house in Conduit Street, Hanover Square—though whether this was openly or surreptitiously it is difficult to conjecture. The author of "Authentic Particulars" has something to say of this period—"Miss Chudleigh, now Mrs. Hervey, a maid in appearance, a wife in disguise, seemed to those who judge from externals only, to be in an enviable situation. Of the higher circles she was the attractive centre, of gayer life the invigorating spirit. Her royal mistress not only smiled on, but approved her. A few friendships she cemented, and conquests she made in such abundance that, like Cæsar in a triumph, she had a train of captains at her heels. Yet, with all this display of happiness, she wanted that without which there is not happiness on earth—peace of mind. Her husband, quieted for a time, grew obstreperous, as she became more the object of admiration. He felt his right, and was determined to assert it. She endeavoured by letter to negotiate him into peace; but her efforts succeeded not. He demanded a private interview; and, enforcing his demands by threats of exposure in case of refusal, she replied through compulsion. The meeting was at the apartment of Captain Hervey; a black servant only in the house. On entering the room where he sat, the first thing done was to prevent her retreat by locking the door. What passed may be better imagined than expressed. The bosom of a wife burning with indignant rage for past injuries sustained in her health, yet obliged to smother the flame of resentment, and assume the mildness of complacency. On the other hand, a husband feeling himself the Lord Paramount over a defenceless woman,

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whose hopes he had blasted, whose person he had defiled." The pathos need not be unduly strained—Elizabeth, it may be assumed, was quite capable of taking care of herself. "This meeting," again to quote the "Authentic Particulars," "ended like every interview she had with Captain Hervey, fatally for her. He would not permit to retire without consenting to that commerce, delectable only when kindred souls melt into each other with the soft embrace. The fruit of this meeting was the addition of a boy to the human race."

Anyhow, there was a child, of which Elizabeth was delivered secretly at Chelsea—the accoucheur was one Cæsar Hawkins, who will be heard of again—who was named Henry Augustus Hervey, and baptised on 2nd November, 1747, in the Chelsea Parish Church.

Hervey, who had been promoted captain, went to sea again.

II.

It is needless to say that there was much comment occasioned by Elizabeth Chudleigh's unexplained temporary absence from Court during her confinement, and some of it came to her ears. "Do you know, my lord," she said to Chesterfield, with something of audacity, "that the world says I have had twins?" "Does it?" he replied. "For my own part, I make a point of believing only half what it says." It is true, however, that this story has been related of other ladies.

But Elizabeth Chudleigh was even to give more and more opportunity for gossip. The Duke of Hamilton returned from the grand tour, and again offered marriage. It was not until 1752 that he consoled himself with the incomparable Elizabeth Gunning. The Duke of Ancaster sought her hand. And here was this poor young woman unable to enter into either of these splendid alliances, and at her wit's end to find reasonable ground for her refusals!

Still, in spite of rumours of all kinds, society tolerated her—it may even be said, took her to its stony heart. She was on the best of terms with her royal mistress, whom she had at last taken into her confidence as to her marriage—which confidence, indeed, was practically forced from her by Hervey's threat to dis-

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close the secret. George II. was thought by many to be her lover. Whether there was any truth in this cannot, of course, be said; but what second-hand evidence exists is rather against than for the suggestion. Even Horace Walpole, who, after his childhood's days, could never abide the lady, in this matter gave her the benefit of the doubt. "I told you," he wrote to Mann in May, 1749, "we were to have another jubilee masquerade. There was one by the King's command for Miss Chudleigh, the Maid of Honour, with whom our Gracious Monarch has a mind to believe himself in love—so much in love that at one of the booths he gave her a watch for her fairing, which cost him thirty-five guineas—actually disbursed out of his Privy Purse, and not charged on the Civil List. Whatever you may think of it, this is a more magnificent present than the cabinet which the late King of Poland sent to the fair Countess Königsmark, replete with all kinds of baubles and ornaments, and ten thousand ducats in one of the drawers. I hope some future Holinshed or Stow will acquaint posterity 'that five-and-thirty guineas were an immense sum in those days.' " That the King was undoubtedly interested in Elizabeth is evident. When then there was a vacancy for the post of housekeeper at Windsor Castle he appointed her mother, and, telling the daughter so at a Drawing-room, said that he hoped she would not think a kiss too great a reward, and then, against all precedent, did kiss her in the circle. "He has had a hankering for her these two years," Walpole commented. "Her life, which is now of thirty years' standing, has been a little historic. What should not experience and a charming face on her side, and nearly seventy on his, produce a title?" Mrs. Chudleigh remained housekeeper at Windsor until her death in 1756.

Thus, as the years passed, Elizabeth Chudleigh became more and more notorious, even in a set so profligate as that at Leicester House. She was intimate with the scandalous Lady Harrington and the no less indecorous Miss Ashe; indeed, she chose her friends with that lack of discretion which always characterised her own behaviour.

Her indelicacy—it is not too much to say, her indecency—was flagrant. At a masquerade at Somerset House, at which George II. was present, she appeared as Iphigenia, but, as Horace

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Walpole told Mann, "so naked that you would have taken her for Andromache"; while Mrs. Elizabeth Montagu wrote to her sister—"Miss Chudleigh's dress, or rather undress, was remarkable. She was Iphigenia for the sacrifice, but so naked that the Maids of Honour, not of maids the strictest, were so offended that they would not speak to her." A contemporary biographer relates that she was very properly rebuked by her royal mistress, who threw a shawl over her in the ballroom. There is a story that when Miss Chudleigh, who certainly was not lacking in audacity, was on another occasion rebuked by Her Royal Highness, whose name at that time was commonly linked with that of the Earl of Bute, she shrugged her shoulders and replied, "Chacun à son But!"

For a long period there is little to relate of her. Frederick, Prince of Wales, died in 1751; but she remained in the service of his widow. It has been asserted that she assisted the Prince of Wales in his alleged marriage to Hannah Lightfoot in 1751; but that whole business is so surrounded with mystery that it is difficult to give credence to it at all. It is enough to remark that she was on good terms with George, both as Prince of Wales and as King. One hears of her at Bath. "Miss Chudleigh was there a fortnight, so altered, I was surprised at her by daylight," Lady Jane Coke wrote to Mrs. Eyre from Windsor on 13th August, 1752. "Lady Ann Hamilton was not with her, who since the smallpox has no remains of beauty, but in her own opinion. The Duke of Kingston was always with them; that is a surprising affair. We are so used at Windsor to their coming together here to her mother, who is housekeeper, that now 'tis scarce mentioned." Again, Lady Jane wrote on 9th October, 1753—"Miss Chudleigh is still a nominal Maid of Honour. She was here near a fortnight, and the Duke of Kingston with her, and happened to be taken very ill, when he sat up all night with her and the apothecary of this town."

That there was a liaison between Elizabeth and the Duke of Kingston is beyond question, and the above letters give clear indication that it began not later than about 1750. There is a curious passage in a letter, dated 8th July, 1753, from Lord John Sackville to his brother, Lord George—"Somebody told me the Duke of Kingston was separated from Madame la Touche, and married to some woman of low extraction.



Miss Chudleigh, in the Character of Iphigenia, at the Venetian Ambassador's Masquerade.

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Evelyn Pierrepont, second Duke of Kingston, is to-day only remembered for his connection with the lady. He was a nephew of Lady Mary Wortley Montagu, who said of him in 1726, just after he had succeeded to the title at the age of fifteen, that he "has hitherto had so ill an education, 'tis hard to make any judgment of him; he has his spirit, but I fear will never have his father's sense. As young gentlemen go, 'tis possible he may make a good figure amongst them." In 1741 he was appointed a Lord of the Bedchamber; and on the outbreak of the rebellion of '45 he raised and commanded a regiment of light horse which fought at Culloden. He is described by Walpole as "a very weak man, of the greatest beauty and finest person in England." He was five years older than his mistress, and was the possessor of great wealth.

When Elizabeth was not in waiting, she and the Duke lived, first in a villa in Finchley, and afterwards, for a while, at Percy Lodge, near Colnbrook, which he rented for a term. Presently, in 1760, he bought of the Duke of Newcastle Churton Lodge, near Farnham, in Surrey, which he renamed Pierrepont Lodge. Of course, they paid occasional visits to his principal residence, Thoresby, near Sherwood Forest. The Duke purchased a plot of ground at Knightsbridge, by Prince's Gate, upon which he erected a great mansion, which was known as Kingston House. This Elizabeth furnished in her own style. "It is not fine, nor in good taste; but loaded with finery," Walpole told George Montagu. "Execrable varnished pictures, chests, cabinets, commodes, tables, stands, boxes, riding on one another's backs, and loaded with tureens, filagree figures, and everything upon earth. Every favour she has bestowed is registered by a bit of Dresden china. There is a glass case full of enamels, eggs, ambers, *lapis lazulis*, cameos, toothpick cases, and all kinds of trinkets, things that she told me were her playthings; and another cupboard full of the finest japan, and candlesticks and vases of rock crystal, ready to be thrown down in every corner." Granted that it was a medley, it was yet a very expensive medley. It is to be feared, as Walpole surmised, that she sold her favours to the highest bidder; that she had many lovers is undeniable.

The Duke was lavish to a degree, and he had no objection to his mistress spending his money like water. She gave magnificent receptions and balls. She had a flair for doing these things

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—or overdoing them—on the grand scale, and the fashionable world was only too delighted to flock to her entertainments. Everybody, of course, knew who was paying, but nobody—or scarcely any one—worried in the least.

One of her great triumphs was the entertainment she gave at Kingston House to celebrate the birthday of the Prince of Wales in June, 1760. “You have heard before you left London of Miss Chudleigh’s intended loyalty on the Prince’s birthday,” Walpole wrote to Lord Strafford. “Poor thing! I fear she has thrown away above a quarter’s salary. It was magnificent and well understood. No crowd; and, though a sultry night, one was not for a moment incommoded. The court was illumined on the whole summit of the wall with a battlement of lamps, smaller ones on every step, and a figure of lanterns on the outside of the house. The virgin mistress began the ball with the Duke of York, who was dressed in a pale blue watered tabby, which, as I told him, if he danced much, would soon be tabby all over, like the man’s advertisement. But nobody did dance much. Miss Chudleigh desired the gamblers would go into the garrets (nay, they are not garrets; it is only the roof of the house hollowed for upper-servants—but I have no upper-servants!). Everybody ran up. There is a low gallery with bookcases, four chambers under the pent of the roof, each hung with the finest Indian pictures on different colours, and with Chinese chairs of the same colours. Vases of flowers in each for nosegays, and in one retired nook a most critical couch! The lord of the festival was there, and seemed neither ashamed nor vain of the expense of his pleasures. At supper she [Miss Chudleigh] offered him tokay, and told him she believed he would find it good. The supper was in two rooms, and very fine, and on all the sideboards and even on the chairs were pyramids and troughs of strawberries and cherries. You would have thought she was kept by Vertumnus.”

There was another gala programme in May, 1763; and again Walpole is the chronicler. “Oh, that you had been at her ball t’other night!” he said to Conway. “History could never describe it, and keep her countenance. The Queen’s real birthday, you know, is not kept: this Maid of Honour kept it—nay, while the Court is in mourning, expected people to be out of mourning for it; the Queen’s family was so,

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Lady Northumberland having desired leave for them. A scaffold was erected in Hyde Park for fireworks. To show the illumination without to more advantage the company were received in an apartment totally dark, where they remained for two hours. If this gave rise to any more birthdays, who could help it? The fireworks were fine, and succeeded well. On each side of the court were two large scaffolds for the virgin's tradespeople. When the fireworks ceased a large scene was lighted in the court, representing Their Majesties, on each side of which were six obelisks, painted with emblems and illuminated mottoes beneath in Latin and English—(I.) For the Prince of Wales, a ship, *Multorum spes*. (II.) For the Princess Dowager, a bird of paradise and two little ones, *Meos ad sidera tollo*. People smiled. (III.) Duke of York, a temple, *Virtuti et honori*. (IV.) Princess Augusta, a bird of paradise, *Non habet parem*—unluckily this was translated, 'I have no peer.' People laughed out, considering where this was exhibited. (V.) The three younger Princes, an orange tree, *Promittit et dat*. (VI.) The two younger Princesses, the flower crown-imperial. I forget the Latin: the translation was silly enough, 'Bashful in youth, graceful in age.' "The poor lady of the house," Walpole continued, "made many apologies for the poorness of the performance, which she said was only oil-paper, painted by one of her servants, but it really was fine and pretty. The Duke of Kingston was in a frock, *comme chez lui*. Behind the house was a cenotaph for the Princess Elizabeth, a kind of illuminated cradle; the motto, 'All the honours the dead can receive.' This burying ground was a strange codicil to a festival, and, what was more strange, about one o'clock in the morning this sarcophagus burst out into crackers and guns."

There is little doubt that the liaison was satisfactory to both parties, and seemed likely to endure permanently. There was, however, a rift in the lute in 1764. "Miss Chudleigh is going to wash herself in the baths in Bohemia," Lady Mary Coke noted in her Diary, 5th December, 1764. "They will be very famous if they can cleanse her from all her disorders. She sets out in February, and has, as the Town says, left the Duke of Kingston a milliner she found in Cranburn Alley to supply her place during her absence; but others say they have quarrelled, and that she leaves England on that account." It is, however, more probable

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that the Duke found the milliner for himself—contemporary scandal has it so, and adds that he took her to Thoresby. Elizabeth's retort was to go abroad. What was sauce for the goose she would not allow to be sauce for the gander. Chesterfield, in a letter to his son in Germany, was in doubt as to the wisdom of her course in her own interests. "Your guest, Miss Chudleigh, is another problem than I cannot solve," he wrote. "She no more wanted the waters of Carlsbad than you did. Is it to show the Duke of Kingston that he cannot live without her? A dangerous experiment, which may possibly convince her that he can. There is a trick, no doubt, in it; but what, I neither know nor care. You did very well to show her civilities; *cela ne gête jamais rien.*"

Elizabeth stayed for a few months at Berlin, where Frederick II. was attentive, though not so attentive as she suggested on her return. He observed, and commented on the fact that, at the marriage of his nephew, Madame Chudleigh drank two bottles of wine and staggered as she danced, nearly falling to the ground. From Berlin she went to Dresden. "All the news Mr. Granville told me," Lady Mary Coke wrote on 16th October, 1766, "was that Miss Chudleigh was set out for Dresden to visit the Electress of Saxony, who, she says, has given her jewels to a very considerable value." There she was welcomed by the Electress, who must have taken a fancy to her, since at the time of the trial she wrote to her—"You have long experienced my love, my reverence, my protection; my everything you may command. Come, then, my dear life, to an asylum of peace. Quit a country where, if you are bequeathed a cloak, some pretender may start up, and ruin you by law to prove it your property. Let me have you at Dresden." In that city she met Prince Radzivil, who had pretensions to the Crown of Poland, and who offered her his hand and heart—both of which she declined with thanks. Then, having sufficiently punished her unfaithful lover, she returned to England. Her Duke received her enthusiastically, and no more was heard of the little milliner.

III.

By this time everybody in society had become aware of the fact that Elizabeth was the wife of Hervey. When each party confides in friends, a secret such as this is passed on again and again in

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confidence, until at last some one is more indiscreet than the rest; then, suddenly, the whole world knows in an instant. However, as it happened, in this case no one was a penny the worse.

In 1768 Elizabeth was in the heyday of her splendour. She went everywhere and was received everywhere. "The Spanish Ambassadors came from Miss Chudleigh's at Knightsbridge, where she said she had dined. It seems she gave a great dinner to several of the foreigners, Lord and Lady Hertford, the Duchess of Portland, and some others. Who may not have company that will give a great dinner," Lady Mary Coke wrote early in that year. "I'll tell you an excellent speech of Miss Chudleigh's to Mrs. Anne Pitt upon Lady Gower's marriage. She said to her, 'Since Lady Susan Stewart has got a husband, I do not think any of us old maids need despair.' 'We old maids,' is not that charming?"

It was just at this time that a blow fell upon Elizabeth. To her surprise she received a communication from her husband, who had for many years past in no way interfered with her, to the effect that he proposed to take proceedings for divorce. There was reason to believe that Hervey had again fallen in love, and wished to marry his charmer. The name of Miss Moyney, daughter of a doctor at Bath, is mentioned by Thomas Whitehead. Though, it must be confessed, he subsequently stated this was not so, it is difficult to credit his denial, for he must have had some special object at this time, since he had certainly had grounds for taking action for over a score of years.

This communication was in a way welcome enough to Elizabeth, for there was little or no doubt that if she was free the Duke of Kingston would espouse her. On the other hand, she was particularly anxious that she should not appear as the guilty party. Obviously, there could be no divorce if there had been no marriage, and if the Court supported her contention then she could marry her Duke.

There is a story that in the long ago Elizabeth, desirous to destroy the proofs of her marriage, had gone one day to the church at Lainston, and had bribed the clerk to let her abstract the register on which her marriage was recorded. This is given here for what it was worth.

That is told of the time when she wished to rid herself of Hervey; but in 1759 Hervey's brother, the Earl of Bristol, was

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reported to be dying, and she had no objection to being a Countess. The story of her successful effort to prove the marriage was told by the Attorney-General at the trial—"She had in the year 1759 lived at a distance from her husband for near twelve years. But the infirm state of the late Lord Bristol's health seemed to open the prospect of a rich successor and an earldom. It was thought worth while, as nothing better had then been offered, to be Countess of Bristol; and for that purpose to adjust the proofs of her marriage. Mr. Amis, the minister who had married them, was at Winchester, in a declining state of health. She appointed her cousin, Mr. Merrill, to meet her there on the 12th of February, 1759; and by six o'clock in the morning she arrived at the Blue Boar inn, opposite Mr. Amis's house. She sent for his wife, and communicated her business, which was to get a certificate of her marriage with Mr. Hervey. Mrs. Amis invited her to their house, and acquainted her husband with the occasion of her coming. He was ill a-bed, and desired her to come up. But nothing was done in the matter of the certificate till the arrival of Mr. Merrill, who brought a sheet of stamped paper to write it upon. They were still at a loss about the form, and sent for one Spearing, an attorney. Spearing thought that the merely making a certificate, and delivering it out in the manner which had been proposed, was not the best way of establishing the evidence which might be wanted. He therefore proposed that a check-book (as he called it) should be bought; and the marriage registered in the usual form, and in the presence of the prisoner. Somebody suggesting that it had been thought improper that she should be present at the making of the register, he desired she might be called, the purpose being perfectly fair, merely to state in the form of a register, which many people knew to be true, and which those persons of honour, then present, gave no room to doubt. Accordingly, the book was bought, and the marriage was registered. The book was entitled 'Marriages, Births, and Burials in the Parish of Lainston.' The first entry ran, 'The 22nd of August, 1742, buried Mrs. Susannah Merrill, relict of John Merrill, Esq.' The next, 'The 4th of August, 1744, married the Honourable Augustus Hervey, Esq., to Miss Elizabeth Chudleigh, daughter of Colonel Thomas Chudleigh, late of Chelsea College, deceased, in the parish church of Lainston, by me, Thomas Amis.' The prisoner

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was in good spirits. She thanked Mr. Amis, and told him it might be a hundred thousand pounds in her pocket."

At the trial there was, of course, reference to the proceedings in 1768.

"Nine years had passed since her former hopes of a great title and fortune had fallen to the ground," the Attorney-General told the Court. "She had at length formed a plan to attain the same object another way. Mr. Hervey had also turned his thoughts to a more agreeable connection, and actually entered into a correspondence with the prisoner, for the purpose of setting aside a marriage so burdensome and hateful to both. The scheme he proposed was rather indelicate; not that afterwards so executed, which could not sustain the eye of justice a moment; but a simpler method, founded in the truth of the case, that of obtaining a separation by sentence *a mensâ et thoro propter adulterium*, which might serve as the foundation of an Act of Parliament for an absolute divorce. He sent her a message to this effect, in terms sufficiently rough, as your Lordship will hear from the witness. Mrs. Cradock, the woman I have mentioned before as being Mrs. Hanmer's servant and present at the marriage, was then married to a servant of Mr. Hervey, and lived in the prisoner's family with her husband. He bade tell her mistress 'that he wanted a divorce, that he should call upon her (Cradock) to prove the marriage; and that the prisoner must supply such other evidence as might be necessary.'"

This high-handed method of proceeding defeated Hervey's object. If she would plead guilty of adultery it would suit him well, but if she did so it would defeat her object. In no measured language she caused it to be communicated to him that she very definitely refused "to prove herself a whore." She went further than this, and on 18th August entered a caveat at Doctors' Commons to hinder any process passing under seal of the Court, at the suit of Hervey, against her, in any matrimonial cause, without notice to her proctor.

Then in the Michaelmas session she instituted a suit of jactitation of marriage in the common form. The answer was a cross libel, claiming the rights of marriage. This was the way out—or so, at first sight, it appeared. As it presently transpired, there was collusion between the parties, for, as the Attorney-General

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said in the trial for bigamy, " Hervey's claim was so shaped, and the evidence so applied, that success became utterly impracticable." A miscarriage of justice consequently ensued.

The following was the judgment of the Consistory Court :—

In the name of God, Amen.—We, John Bettesworth, Doctor of Laws, Vicar-General of the Right Reverend Father in God, Richard, by divine permission, Lord Bishop of London, and Official Principal of the Consistorial and Episcopal Court of London, having seen, heard, and understood, and fully and maturely discussed the merits and circumstances of a certain cause of jactitation of marriage, which was lately controverted, and as yet remains undetermined before us in judgment, between the Honourable Elizabeth Chudleigh, of the parish of St. Margaret, Westminster, in the county of Middlesex, spinster, the party, agent, and complainant, of the one part, and the Right Honourable Augustus John Hervey, of the parish of St. James, Westminster, in the county of Middlesex, and diocese of London, batchelor, falsely calling himself the husband of the said Honourable Elizabeth Chudleigh, the party accused and complained of, on the other part, and we rightly and duly proceeding therein, and the parties aforesaid lawfully appearing before us by their proctors respectively, and the proctor of the said Honourable Elizabeth Chudleigh, praying sentence to be given, and justice to be done to his party, and the proctor of the said Right Honourable Augustus John Hervey, also earnestly praying sentence and justice to be done to his said party. And we have carefully looked into, and duly considered of the whole proceedings, had and done before us in the said cause, and observed, by law what ought to be observed in this behalf, have thought fit, and do thus think fit to proceed to the giving and promulging our definitive sentence, our final decree in this same cause, in manner and form following (to wit) :—Forasmuch as by the acts enacted, alleged, exhibited, propounded, proved, and confessed in this cause, we have found and clearly discovered, that the proctor of the said Honourable Elizabeth Chudleigh hath fully and sufficiently founded, and proved his intention deduced in a certain libel and allegation, and other pleadings and exhibits given in, exhibited and admitted on her behalf in this same cause, and now remaining in the registry of this Court (which libel and allegation, and other pleadings and exhibits, we take, and will have taken as if herein repeated and inserted for us to pronounce, as hereinafter we shall pronounce) and that nothing, at least effectual in law, hath on the part and in behalf of the said Honourable Augustus John Hervey, been excepted, deduced, exhibited, propounded, proved, or confessed in this same cause, which may or ought in any wise to defeat, prejudice, or weaken the intention of the said Honourable Elizabeth Chudleigh, deduced as aforesaid; and particularly that the said Right Honourable Augustus John Hervey hath totally failed in the proof of his allegation given in, and admitted in this cause, whereby he pleaded and propounded a pretended marriage to have been solemnised between him and the said Honourable Elizabeth Chudleigh, spinster : And therefore we, John Bettesworth, Doctor of Laws, the

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Judge aforesaid, first calling upon God, and setting him alone before our eyes, and having heard counsel in this cause, do pronounce, decree, and declare that the said Honourable Elizabeth Chudleigh, at and during all the time mentioned in the said libel, given in and admitted in this cause, and now remaining in the registry of this Court, was, and now is, a spinster, and free from all matrimonial contracts, or espousals (as far as to us as yet appears) more especially with the said Right Honourable Augustus John Hervey; and that the said Right Honourable Augustus John Hervey, notwithstanding the premises, did in the years and months libellate, wickedly and maliciously boast, and publicly assert (though falsely) that he was contracted in marriage to the said Honourable Elizabeth Chudleigh, or that they were joined or contracted together in matrimony; wherefore we do pronounce, decree, and declare, that perpetual silence must and ought to be imposed and enjoined the said Right Honourable Augustus John Hervey, as to the premises libellate, which we do impose and enjoin him by these presents, and we do decree the said Right Honourable Augustus John Hervey to be admonished to desist from his boasting and asserting that he was contracted to or joined with the said Honourable Elizabeth Chudleigh in matrimony, as aforesaid, and we do also pronounce, decree, and declare that the said Right Honourable Augustus John Hervey ought, by law, to be condemned in lawful expenses made, or to be made, in this cause, on the part and behalf of the said Honourable Elizabeth Chudleigh, to be paid to the said Elizabeth Chudleigh, or her proctor; and accordingly we do condemn him in such expenses which we tax at, and moderate to, the sum of £100 of lawful money of Great Britain, besides the expenses of a motion for payment on this behalf, by this our definitive sentence, or final decree, which we read and promulge by these presents.

J. BETTESWORTH.

Arthur Collier.

Peter Calvert.

William Wynne.

This sentence was read, promulged, and given by the within-named the Vicar-General, and Official Principal, on Friday, the 10th day of February, in the year of our Lord, 1769, in the Dining-room adjoining to the Common Hall of Doctors' Commons, situate within the parish of St. Benedict, near Paul's Wharf, London; there being then and there present the witnesses specified in the Acts of Court, which I attest.

MARK HOLMAN, Notary Public,
Deputy Register.

The farce was watched with interest and amusement by society, and some contemporary comments which read amusingly may be quoted.

“Mr. Walpole,” Lady Mary Coke wrote in her Diary in August, 1768, “told us of another divorce that is to be applied for next session of Parliament. Mr. Augustus Hervey (I suppose

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at the desire of his brother, Lord Bristol) is going to prove his marriage, as the first step towards suing for being unmarried, and has sent the lady who goes by the name of Miss Chudleigh a letter to signify his intention; to which she has returned this answer, that if he prove the marriage he will have £16,000 to pay, as she owes that sum of money. As this answer is looked upon to be intended to stop the proceeding, everybody is much surprised, as it was the general opinion that if she was at liberty the Duke of Kingston would marry her, which seems now to be doubtful." A little later she added—"Mr. Hervey is really going to sue for a divorce, but he told Lady Blandford that the answer which it was reported Miss Chudleigh had sent to his letter was an invention, for he had received none."

Horace Walpole, who in matters of gossip, was never a day behind the fair, wrote to Sir Horace Mann about the same time. "Well, but to come to goddesses," he related. "After a marriage of twenty years, Augustus Hervey, having fallen in love with a physician's daughter at Bath, has attacked his spouse, the Maid of Honour, the fair Chudleigh, and sought a divorce for adultery. Unfortunately, he had waited till all the witnesses of their marriage, and of her two deliveries, are dead, as well as the two children. The provident virgin had not been so negligent. Last year she forced herself into the house of the parson who had married them, and who was at the point of death. By bullying, and to get rid of her, she forced the man to give up the certificate. Since that she has appeared at Doctors' Commons and sworn by the Virgin Mary and Diana that she was never married to Mr. Hervey." The facts, it will be observed, are not accurately stated, but none the less the passage makes good reading. "Next week," Walpole continued, "this fair injured innocent, who is but fifty, is to be married to the Duke of Kingston, who has kept her openly for about half that time, and who by this means will recover half his fortune which he has lavished on her. As a proof of her purity and poverty, her wedding gown is white satin trimmed with Brussels lace and pearls. Every word of this history is extremely true. The physician, who is a little more in his senses than the other actors, and a little honester, will not give his daughter, nay, has offered her five thousand pounds not to marry Mr. Hervey, but Miss Rhubarb is as much above worldly decorum as the rest, and persists, though there is no more doubt

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of the marriage of Mr. Hervey and Miss Chudleigh than that of your father and mother. It is a cruel case upon his family, who can never acquiesce in the legitimacy of his children, if any come from this bigamy."

The general public learnt the news from the "Annual Register" for 1769—"The great cause depending between the Hon. Mrs. Chudleigh and the Right Hon. A. John Hervey, Esq., was, this day, delivered on the Consistory Court of London; and she was declared to be free from any contract with the said gentleman."

Elizabeth, being thus pronounced a spinster, was now able to wed her lover, who, in spite of Lady Mary Coke's opinion, was not reluctant to make an honest woman of his mistress.

According to Thomas Whitehead, the ceremony was performed in the Duke's dressing-room, at the Duke's house in Arlington Street, in the parish of St. Margaret, Westminster, about eight o'clock in the evening of 8th March, 1769. His account is at least circumstantial—"In the morning of that day Sir James Laroche waited on the Duke to breakfast, and take a walk into the city, which they frequently did. About one o'clock the same day Miss Chudleigh called in her *vis-à-vis* to inquire if the Duke was at home. The porter informed her of his going out with Sir James. She immediately departed in search of him, and at half-past three (which was His Grace's usual time) returned again, seemingly much agitated. The porter was ordered to call Whitehead. When I came to her she asked if I knew where the Duke was. I told her he was gone into the city with Sir James, but to what part I knew not. She ordered the carriage to turn about and go to Knightsbridge. It was near five o'clock before His Grace and Sir James returned, which was very late, as he seldom exceeded the hour of four. In about an hour she returned, and was ushered into the Duke's apartment, he being just come home. Ten minutes afterwards, all the footmen and chairmen were despatched to different parts for lawyers, clergymen, &c., and in two hours they were all assembled."

However, that it is circumstantial is all that can be said of Whitehead's account, for, as a matter of fact, the Duke went through a ceremony of marriage with Elizabeth Chudleigh at St. George's, Hanover Square, London, the Rev. Samuel Harper officiating. It has been said that Augustus Hervey was present, and said that he had come to take a last look at his widow.

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The following is the entry in the register of St. George's Church:—"The most noble Evelyn Pierpoint, Duke of Kingston, a batchelor and the honourable Mrs. Elizabeth Chudleigh of Knightsbridge in Middlesex, a Spinster were married in this Parish by special licence of the Archbishop of Canterbury this eight day of March in the year one thousand seven hundred and sixty nine by me S. Harper, of the British Museum.

"This marriage was solemnized between us

" KINGSTON.

" ELIZABETH CHUDLEIGH.

"In the presence of { Masham, J. Ross Mackye, Will. Yeo,
E. B. A. Laroche, A. K. F. Gilbech,
Arthur Collier, Jas. Laroche, Junr.,
C. Masham, Alice Yeo."

On her marriage Elizabeth ceased to be a Lady-in-Waiting to the Princess Dowager, which post she had held for more than a quarter of a century. The new Duchess was presented at Court, on which occasion the King and Queen and the High Officers of the Household wore her favours.

Of the married life of Elizabeth and the Duke there is little to record. They resided at Thoresby and Kingston House, and continued to entertain lavishly. Lady Mary Coke suffered a great shock in July, 1769, as she recorded in her Diary—"I am told that the Duke gives hints that he believes the person he calls his wife is with child; there wanted only this to complete a life so filled with infamy that no age, I think, can parallel; I hope His Grace's heirs will be summoned to the delivery and prove the fraud that is intended to deprive them of the Duke's estate." There was, however, no issue of the marriage.

It is on record that the Duke was in ill-health, and it is believed that his wife was devoted to him, even though (so it was said), when she had difficulty in getting her way, she from time to time threatened him with a pistol. That, however, was only her playful little way.

IV.

The Duke of Kingston died on 23rd September, 1773, after something more than four years of marriage. "Her Grace of Kingston's glory approaches to consummation in a more worldly

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style," Walpole noted. "The Duke is dying, and has given her the whole estate; seventeen thousand a year. I am told she has already notified the contents of the will, and made offers for the sale of Thoresby. Pious matrons have various ways of expressing decency." Allowance must be made for the pleasantries of a cynical letter-writer, but one cannot but smile at his account of the Duchess after the death of her husband—"She moved to town with the pace of an interment, and made as many halts between Bath and London as Queen Eleanor's corpse. I hope for mercy she will not send for me to write verses on all the crosses she shall erect where she and the horses stopped to weep; but I am in a panic, for I hear my poor lines at Amphill are already in the papers. Her black *crêpe* veil, they say, contained a thousand more yards than that of *mousseleine la sérieuse*, and at one of the inns where her grief baited she was in too great an agony to descend at the door, and was slung into a bow-window, as Mark Antony was into Cleopatra's Monument."

The Duke, whose title died with him, left his widow his personal estate without reservation, also a life's interest in his real estate, which later, on her death, was to pass to Charles Medows, second son of his sister, Lady Francis Pierrepont, who was the second wife of the diplomatist, Sir Philip Medows (or Meadows). When Charles succeeded to the estate in 1788 he assumed the name of Pierrepont—in 1806 he was created Earl Manvers. The Duke entirely disinherited his eldest nephew, Evelyn, which was undoubtedly the reason for the trouble that presently fell upon the Duchess. Why Evelyn Medows was disinherited is not known, but the Duchess made a statement when on trial, which must, however, be regarded with suspicion.

My lords, I have heretofore forbore from the great love and affection to my late noble lord to mention what were the real motives that induced His Grace to disinherit his eldest nephew; and when my plea and answer in Chancery were to be argued I particularly requested of the counsel to abstain from any reflections upon my adversaries, which the nature of their prosecutions too much deserved; and grieved I am now that I must no longer conceal them. For as self-preservation is the first law of nature, and as I am more and more persecuted in my fortune and my fame, and my enemies hand about pocket-evidence to injure me in every company, and with double tongues they sting me to the heart, I am reduced to the sad necessity of saying that the late Duke of Kingston was made acquainted with the fatal cruelty with which

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Mr. Evelyn Meadows treated an unfortunate lady, who was as amiable as she was virtuous and beautiful; to cover which offence he most ungratefully and falsely declared that he broke off his engagement with her for fear of disobliging the Duke, which he has often been heard to say. This, with his cruelty to his sister and mother, and an attempt to quit actual service in the late war, highly offended the Duke; and it would be difficult for him, or his father, to boast of the friendly intercourse with His Grace for upwards of eighteen years.

Amongst those who knew about Elizabeth and her marriage with Hervey, there was a keen desire to know by what style the Duke had proclaimed her his heiress. Walpole maliciously declared that the lawyers had been careful to guard against all contingencies, and had described her as “my dearest wife, Elizabeth, Duchess of Kingston, *alias* Elizabeth Chudleigh, *alias* Elizabeth Hervey”—upon which he wittily asked Mann—“Did you ever hear of a Duchess described in a will as a street-walker is indicted at the Old Bailey?”

The following extracts from the will, which was executed on 5th July, 1770, are of moment:—

I do by this will ratify and confirm a settlement, which I made of the annual sum, or yearly rent charge, of Four Thousand Pounds, on my wife, Elizabeth, Duchess of Kingston; and that the said sum should be unto and to the use of the said Elizabeth, Duchess of Kingston, my wife, and her assigns for and during the term of her natural life, in case she so long continues my widow, and unmarried, and no longer.

And my said wife shall be permitted during her widowhood to receive and take the whole yearly rents, and profits, of all the manors, lands, and hereditaments, before devised, if full satisfaction, recompense, and discharge of and for so much of the said annual sum, or yearly rent charge of Four Thousand Pounds, as shall grow due during her said widowhood, but in case my said wife shall determine her said widowhood during her life, then I shall give and devise the same to Charles Medows, second son of Philip Medows.

Also I give and bequeath to my said wife, Elizabeth, Duchess of Kingston, all my furniture, pictures, plate, jewels, china, arrears of rent, and all my other effects and personal estate, of whatever nature or kind soever, for her own use absolutely, and as and for her own goods, chattels, and effects for evermore.

It is believed that the Duke left his property to Elizabeth only during widowhood, not from any selfish motive, but because he was afraid that, with her vanity, she might become the prey of an adventurer.

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When the Duke was ill Elizabeth had proposed, should he partially recover, to take him abroad. "The Lady who calls herself Duchess of Kingston wrote a letter to the Electress after the Duke was struck with the palsy, that if he recovered she should carry him next year to the baths of Carlsbad in Bohemia, and should take Dresden in her way," Lady Mary Coke, at Vienna, noted in her Diary in August, 1773. "If he died, the affliction she should be in would make those baths absolutely necessary to re-establish her health, so that at all events she should see the Electress next summer. When first I came they told me the Electress would certainly speak to me about her; I told them my answer was ready, that I had very little acquaintance with that lady, which I imagined would put an end to the discourse. Accordingly, she did mention her, but in no way that embarrassed me in the least. She said she had had a letter from the Duchess of Kingston that mentioned the Duke's illness. She feared, she added, her anxiety for him would injure her health. I answered, letters from England mentioned the Duke of Kingston being attacked with a paralytic disorder. This succeeded: she never renewed the discourse."

Elizabeth now went on the Continent, and visited Rome, where she was received by the Pope. Walpole, ever malicious where she—and how many others?—was concerned, wrote to Mann, asking for information about her. "What think you of that pompous piece of effrontery and imposture, the Duchess of Kingston? Is there common sense in her ostentation and grief, and train of black crape and band of music? I beg you not to be silent on that chapter; it is as comic a scene as that of the Countess Trifaldine in 'Don Quixote,' and, though she is the high and mighty Princess, at least she does not pretend to be a royal one." And presently he wrote again—"Her Grace of Kingston, though a phenomenon, is no original; the purchase of Sixtus Quintus's villa seems to be an imitation of that stroller, Queen Christina." Lady Mary Coke was even more bitter about her in her Diary than Walpole in his letters—"Sir Horace Mann wrote Mr. Walpole word that the lady who calls herself Duchess of Kingston is expected at Florence, and that the Electress of Saxony had recommended her to the great Duchess. I'm persuaded she will be very well received, for virtues are no recommendation at that Court,

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and, though Lady Hertford told Mr. Walpole she supposed her going there would be a great distress to Sir Horace Mann, I am not of her opinion, and am sure he will be as civil to her as he ever was to anybody, and much more so than he was to me. Did I tell you Mr. Fitzroy saw that terrible woman at Calais, and she complained bitterly of the Medows family, saying how cruel it was of them to interrupt her peace of mind? If, with all her crimes, her peace of mind is only disturbed by the Medows family, 'tis extraordinary indeed?"

V.

Samuel Foote, always on the look-out to make money by hook or by crook, thought the time ripe to introduce the Duchess in a play, and he wrote a comedy, entitled "A Trip to Calais." "Foote deemed the crimes and follies of individuals convertible into advantage by the amalgamy of wit," thus the author of the "Authentic Particulars of the Life of the late Duchess of Kingston." "The real design of Foote was to obtain a considerable sum of money from the Duchess for suppressing the play. With this in view he contrived to have it communicated to Her Grace, by an indifferent person, that the Haymarket Theatre would open with the entertainment in which she was, as the phrase is, taken off to the life. This was intended to alarm, and it did effectually alarm, her. She sent for Mr. Foote. He attended, with the piece in his pocket. She desired him to read a part of it. He obeyed; and, proceeding in the character of Lady Kitty Crocodile, his auditoress could no longer forbear. She arose, in a violent passion, 'This is scandalous, Mr. Foote! What a wretch you have made me!'"

The blackmailing dramatist was careful to let it come to the ears of the Duchess that he had lampooned her in a play. When he was invited to call on her, and obeyed the summons, he was careful to assert that the character in his play, Lady Kitty Crocodile, was most certainly not intended for Her Grace. If there were any points of resemblance, this had happened inadvertently: for his part he could not see them. He read her an extract or two—

Lady KITTIE CROCODILE—The conflict was great, but dear Mrs. Clack, what could I do? Troy stood a siege for only ten years; now sixteen were fully accomplished before I am compelled to surrender.

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Mrs. CLACK—That was standing a vast while to be sure. I recollect what added to your Ladyship's grief was that the nuptials should happen to fall in the middle of Lent.

O'DONOVAN—She couldn't bear to stay in England after the death of her husband; everything there put her so much in mind of her loss. Why, if she met by accident with one of his boots it always set her a-crying. Indeed, the poor gentlewoman was a perfect Niobe.

CLACK—Indeed, I found her Ladyship in a very incontinable way when I waited on her upon the mournful occasion. Indeed, she was rather more cheerful when she tried on her weeds; and no wonder, for it is a dress vastly becoming, especially to people inclined to be fat. But I was in hopes, by this time, she had got over her griefs.

O'DONOVAN—Not at all, indeed. Indeed, with the French she is facetious and pleasant enough; but she no sooner set sight on anything English than the tears burst out like a whirlwind.

It was unfortunate, it may be presumed he remarked, that the Duchess had known the Duke for many years before she married him; it was also distressing that both she and Lady Kitty Crocodile were married in mid-Lent—but coincidences always will occur. What could he do? On reflection, he was so gracious as to intimate to the Duchess that if she would really prefer that he should not produce the play, he was prepared to fall in with her wishes. No gentleman—he had been educated at Worcester and Oxford—could do less. Only, he felt it incumbent upon him to point out, by suppressing “A Trip to Calais,” not only would be depriving the world of a work of genius—the world must look after itself, and was quite capable of so doing—but he would have wasted the arduous labours of many months, and also have sacrificed the pecuniary rewards that would undoubtedly have been his. Amiably—he would not take advantage of a lady, however wealthy—he suggested that the trifling sum of £2000 would meet the occasion. What the Duchess said about this “inadequate recompense,” even if the exact words had been recorded, certainly could not be printed in this polite age. She was, however, determined that “A Trip to Calais” should not be staged. She offered a sum much smaller than that mentioned by Foote. The story goes that, little by little, she increased her bid until it amounted to so much as £1600. Foote, now confident that his market was safe, held out for the full amount. By so doing he overreached himself. The harassed lady took the Duke of Newcastle into her confidence, and he put the matter before Lord Hertford, the Lord Chamberlain, who cen-

The Duchess of Kingston.

sured the play. Whereupon Foote, who certainly was not lacking in audacity, wrote to Lord Hertford—

My Lord,

I did intend troubling your Lordship with an earlier address, but the day after I received your prohibitory mandate I had the honour of a visit from Lord Mountstuart, to whose interposition I find I am indebted for your first commands, relative to the "Trip to Calais," by Mr. Chetwynd, and your final rejection of it by Colonel Keen.

Lord Mountstuart has, I presume, told your Lordship that he read with me those scenes to which your Lordship objected, that he found them collected from general nature, and applicable to none but those who, through consciousness, were compelled to a self-application. To such minds the "Whole Duty of Man," next to the Sacred Writings, is the severest satire that ever was wrote; and to the same mark, if comedy directs not her aim, her arrows are shot in the air; for by what touches no man, no man will be mended. Lord Mountstuart desired that I would suffer him to take the play with him, and let him leave it with the Duchess of Kingston. He had my consent, and at the same time an assurance that I was willing to make any alteration that Her Grace would suggest. Her Grace saw the play; and, in consequence I saw Her Grace. With the result of that interview, I shall not, at this time, trouble your Lordship. It may, perhaps, be necessary to observe that Her Grace did not discern, which your Lordship, I daresay, will readily believe, a single trait in the character of Lady Kitty Crocodile that resembled herself.

After this representation, your Lordship will, I doubt not, permit me to enjoy the fruits of my labour; nor will you think it reasonable because a capricious individual has taken it into her head that I have pinned her ruffles awry, that I should be punished by a poignard stuck deep in my heart: your Lordship has too much candour and justice to be the instrument of so violent and ill-directed a blow.

Your Lordship's determination is not only of the greatest importance to me now, but must inevitably decide my fate for the future, as after this defeat it will be impossible for me to muster up courage enough to face Folly again. Between the Muse and the Magistrate there is a natural Confederacy; what the last cannot punish, the first often corrects; but when she finds herself not only deserted by her ancient ally, but sees him armed in defence of her foe, she has nothing left but a speedy retreat: Adieu, then, my Lord, to the stage. *Valeat res ludicra*, to which I hope I may with justice add, *plaudite*, as during my continuance in the service of the Public, I never profited by flattering their passions, or falling in with their humours, as, upon all occasions, I have exerted my little powers (as indeed I thought it my duty) in exposing follies, how much soever the favourites of the day; and pernicious prejudices, however protected and popular. This, my Lord, has been done, if those may be believed who have the best right to know, sometimes with success. Let me add, too, that in doing this I never lost my credit with the Public, because they knew I



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proceeded upon principle; that I disdained being either the echo or the instrument of any man, however exalted his station, and that I never received reward or protection from any other hands than their own.

I have the honour to be, etc.,

SAMUEL FOOTE.

Foote being unable to produce "A Trip to Calais," announced his intention to publish it. Friends of the Duchess went to see him, and he was made to see very clearly that if he carried out his threat—for it was nothing less—there was trouble of all sorts in store for him—from horsewhipping to legal proceedings.

The following correspondence between him and the Duchess then ensued:—

North End,
Sunday, August 13, 1775.

Madam,

A member of the Privy Council and a friend of Your Grace's, probably the Duke of Newcastle, he has begged me not to mention his name, but I suppose Your Grace will easily guess him, has just left me. He has explained to me, what I did not conceive, that the publication of the scenes in "A Trip to Calais" at this juncture, with the dedication and preface, might be of infinite ill-consequence to your affairs.

I really, Madam, wish you no ill, and should be sorry to do you an injury.

I therefore give up that consideration what neither Your Grace's offer, nor the threats of your agents, could obtain. The scenes shall not be published, nor shall anything appear at my theatre, or from me, that can hurt you—*provided* the attacks made on me in the newspapers does not make it necessary for me to act in defence of myself.

Your Grace will therefore see the necessity of giving proper directions.

I have the honour to be,

Your Grace's most devoted servant,

SAMUEL FOOTE.

Kingston House,
Sunday, August 13, 1775.

Sir,

I was at dinner when I received your ill-judged letter. As there is little consideration required, I shall sacrifice a moment to answer it.

A member of your privy counsel can never hope to be of a lady's cabinet.

I know too well what is due to my own dignity, to enter into a compromise with an extortionate assassin of private reputation. If I before abhorred you for your slander, I now despise you for your concessions;

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it is a proof of the illiberality of your satire, when you can publish or suppress it as best suits the needy convenience of your purse. You first had the cowardly baseness to draw the sword, and, if I sheath it, until I made you crouch like the subservient vassal as you are, then is there not spirit in an injured woman, nor meanness in a slanderous buffoon.

To a man my sex would have screened me from attack—but I am writing to a descendant of a Merry Andrew, and prostitute the term of manhood, by applying it to Mr. Foote.

Clothed in my innocence as in a coat of mail, I am proof against an host of foes; and conscious of never having intentionally offended a single individual, I doubt not but a brave and generous people will protect me from the malevolence of a theatrical assassin. You shall have cause to remember, that though I would have given liberally for the relief of your necessities, I scorn to be bullied into a purchase of your silence.

There is something, however, in your pity at which my nature revolts. To make me an offer of pity at once betrays your insolence and your vanity. I will keep the pity you send until the morning before you are turned off, when I will return it by a Cupid, with a box of lip-salve, and a choir of choristers shall chant a stave to your requiem.

E. KINGSTON.

P.S.—You would have received this sooner, but the servant has been a long time writing it.

Madam,

Though I have neither time nor inclination to answer the illiberal attacks of your agents, yet a public correspondence with Your Grace is too great an honour for me to decline.

I can't help thinking but it would have been prudent in Your Grace to have answered my letter before dinner, or at least postponed it to the cool hour of the morning; you would have then found that I had voluntarily granted that request which you had endeavoured, by so many different ways, to obtain.

Lord Mountstuart, for whose amiable qualities I have the highest respect, and whose name your agents first unnecessarily produced to the public, must recollect, when I had the honour to meet him at Kingston House, by Your Grace's appointment, that instead of begging relief from your charity, I rejected your splendid offers to suppress the "Trip to Calais" with the contempt they deserved. Indeed, madam, the humanity of my royal and benevolent Master, and the public protection, have placed me much above the reach of your bounty.

But why, madam, put on your coat of mail against me? I have no horrible intentions. Folly, not vice, is the game I pursue. In those scenes which you as unaccountably apply to yourself, you must observe that there is not the slightest hint at the little incidents of your life which have exercised the curiosity of the Grand Inquest for the county of Middlesex. I am happy, Madam, however, to hear that your robe of innocence is in such perfect repair. I was afraid it might have been a

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little the worse for the wearing; may it hold out to keep you warm this coming winter.

The progenitors Your Grace has done me the honour to give me are, I presume, merely metaphorical persons, and to be considered as the authors of my Muse and not of my manhood: a Merry Andrew and a Prostitute are no bad poetical parents, especially for a writer of plays; the first to give the humour and mirth; the second the graces and power of attraction. Prostitutes and players live by pleasing the public; but Your Grace may have heard of ladies who, by private practice, have accumulated amazing great fortunes. If you mean that I really owe my birth to that pleasant connection, Your Grace is grossly deceived. My father was, in fact, a very useful Magistrate and respectable country gentleman, as the whole of the county of Cornwall will tell you; my mother, the daughter of Sir Edward Goodere, Bart., who represented the county of Hertford; her fortune was large, and her morals irreproachable, until Your Grace condescended to stain them; she was upwards of four-score years old when she died, and, what will surprise Your Grace, was never married but once in her life.

I am obliged to Your Grace for your intended present on the day, as you politely express it, when I am turned off. But where will Your Grace get the Cupid to bring me the lip-salve? That family, I am afraid, has long quitted your service.

Pray, madam, is not Jackson the name of your female confidential secretary? and is he not generally clothed in black petticoats made out of your weeds?

“So mourned the dame of Ephesus her love.”

I fancy Your Grace took the hint when you last resided at Rome; you heard there, of a certain Joan, who was once elected a Pope, and, in humble imitation, have converted a pious Parson into a chambermaid. The scheme is new in this country, and has doubtless its particular pleasures. That you may never want the benefit of the clergy in every emergency is the sincere wish of

Your Grace's most devoted and obliged humble servant,

SAMUEL FOOTE.

With this the matter would appear to have ended, so far as the Duchess was concerned. “A Trip to Paris,” first intended for representation in 1776, was here years after produced, with drastic alterations, as “The Capuchin.” Presently, both plays were printed with the following “advertisement”: “That the Publick may not be deceived, and the Reputation of the Author injured, by the publication of Pieces fabricated in order to take advantage of the general curiosity, the Comedy of ‘A Trip to Paris’ is here printed as originally written, and intended for representation; together with all the Alterations and Additions

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which the Writer thought necessary, when he afterwards produced it on the stage, under the title of 'The Capuchin.' ”

VI.

Evelyn Medows had no intention of sitting down quietly under his disinheritance, and he determined to make every effort to upset the will. Of course, he, like the rest, had heard of the alleged marriage of Elizabeth and Hervey, and, while the Consistory Court had in honest ignorance decided that no marriage had taken place, he, like the rest of his world, had no doubt that Doctors' Commons had been shamefully misled. The first step in his plan of attack was to endeavour to establish the marriage. That done, it seemed to him and his advisers that the rest would be easy.

Thomas Whitehead is a chronicler not to be believed on his oath, but, notwithstanding, he may here be quoted—"The year after His Grace's decease, Mr. Pierrepont's eldest brother, Captain Evelyn Medows, came to Bath and asked me some questions concerning the Duchess's behaviour to the Duke, in order, if possible, to get the will set aside. I told him of her ill-treatment of my good Lord; that he had no will to act as he pleased; that he could not even go an airing without her leave, with many other things, the chief part of which I related in my former letters. He wished I would make a memorandum of them and give it to his attorney; and likewise accompany him to Bristol to find out Mr. Phillips's wife, the late Mrs. Amis, promising to reward me for my trouble."

Mrs. Phillips was found, and so was Ann Cradock, who, it will be remembered, was present at the Hervey wedding. The latter was only too happy to bear testimony that might injure her late mistress. It is stated that she had gone to the Duchess, then on the eve of going to the Continent, and had asked her to increase the small pension of which she was in receipt. Her Grace, probably quite rightly, looking upon this demand as blackmail, refused definitely to do anything for her—no doubt at the same time making such remarks as occurred to her.

The intention of Medows soon leaked out. "The newspapers will have informed you," Lady Mary Coke told a friend about this time, "that the lady who called herself Duchess of Kingston is proved to be no other than Mrs. Hervey, and her ill-acquired fortune will soon follow her title, for 'tis said she will certainly

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lose it by these words in the Duke of Kingston's will, that he gives her all his estate, &c., as long as she continues his widow, and no longer. Lord Bristol is a little better, and is going to Bath. Most people think Mr. Hervey will be divorced, as he will have little trouble in obtaining it."

"The Duchess of Kingston," Lord Bruce wrote to the Earl of Charlemont, 14th July, 1774, "was only one night at her house at Knightsbridge, being seized with a panic on hearing the Duke of Kingston's will is disputed by Mr. Medows and his eldest son, who are supposed to have secured in their favour a woman who was present at Her Grace's marriage with Mr. Hervey. She is gone back to the Continent, and her return (if ever) uncertain. Russia is mentioned as a country she is likely to go to. When she waited on the Pope at Rome, where she was going to buy a villa and dig for antiquities, she told His Holiness that there was no coming to Jerusalem without adoration. The villa Negrone is, I believe, what she was in treaty for."

This is confirmed by Walpole, who says—"Christina Duchess of Kingston is arrived, in a great fright, I believe, for the Duke's nephews are going to prove her first marriage, and hope to set the will aside. It is a pity her friendship with the Pope had not been earlier; he might have given her a dispensation. If she loses her cause, the best thing he can do will be to give her the veil." Later he added—"I told you in my last that Her Grace of Kingston has arrived. Had I written it four-and-twenty hours later, I might have told you she was gone again, with much precipitation, and with none of the pomp of her usual progresses. In short, she had missed her lawyer's letters, which warned her against returning. A prosecution for bigamy was ready to meet her. She decamped in the middle of the night; and six hours after the officers of justice were at her door to seize her. This is but an unheroic catastrophe of her romance, and, though she is as thorough a comedian as Sixtus Quintus, it would be a little awkward to take possession of his villa, after being burnt in the hand. What will be the issue of the suit and lawsuit I cannot tell. As so vast an estate is the prize, the lawyers will probably protract it beyond this century. Her friend, the Electress of Saxony, said to the Duke of Gloucester—'Poor thing! what could she do? she was so young when she was first married!'"

Mrs. Delany almost gloatingly tells the story to the Rev. John

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Dawes—"The Duchess of Kingston made a short visit to England; she came from Rome, where she was settled. She stayed twenty-four hours at her house at Knightsbridge, and then set off for Russia—her sudden flight, they say, occasioned by Mr. Evelyn Medows having gone to law with her, to prove her marriage with Mr. Hervey, which, it is thought, he will certainly do, having gained a certain evidence of it—a man who the Duchess of Kingston gave ten thousand pounds of hush-money, and who for the same sum from Mr. Evelyn Medows is gained against her. So rogues betray rogues; it is happy when innocence escapes their snares." Mrs. Delany's exuberance had clearly run away with her—who was the man who received £10,000 from each party?

Anyhow, the Duchess returned hurriedly to Rome.

While she was away the Earl of Bristol was taken seriously ill. He died, unmarried, on 18th March, 1775, and was succeeded in the title and estates by his brother, Augustus John Hervey. This was of great moment to the Duchess of Kingston. "The bigamist Duchess is likely to become a real peeress at last," Walpole had written to Sir Horace Mann, 11th November, 1774. "Lord Bristol has been struck with a palsy that has taken away the use of all his limbs. If he dies, and Augustus should take a fancy to marry again, as two or three years ago he had a mind to do, his next brother, the Bishop, may happen to assist the Duke of Kingston's relations with additional proofs of the first marriage. They now think they shall be able to intercept the receipt of the Duke's estate; but the law is a horrid liar, and I never believe a word it says before the decision." After the Earl had passed away, "Will her Grace of Kingston now pass eldest, and condescend to be, as she really is, Countess of Bristol? or will she come over and take her trial for the becoming dignity of the exhibition in Westminster Hall?" Walpole asked. "How would it sound, 'Elizabeth Countess of Bristol, *alias* Duchess of Kingston, come into Court'! I can tell nothing more extraordinary, nor would any history figure near hers. It shows great genius to strike out anything so new as her achievements."

Legal proceedings against the Duchess for bigamy were set on foot, and a Grand Jury found a True Bill—

MIDDLESEX.

The Jurors for our Sovereign Lord the now King, upon their oath, present, that Elizabeth, the wife of Augustus John Hervey, late of the



Augustus John Hervey, Third Earl of Bristol.

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parish of St. George, Hanover Square, in the county of Middlesex, Esq., on the eighth day of March, in the ninth year of the reign of our Sovereign Lord, George III., now King of Great Britain, and so forth, being then married, and then the wife of the said Augustus John Hervey, with force and arms, at the said parish of St. George, Hanover Square, in the said County of Middlesex, feloniously did marry and take to husband Evelyn Pierrepont, Duke of Kingston (the said Augustus John Hervey, her former husband, being then alive) against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his Crown and dignity: and the said Jurors for our said Sovereign Lord, the now King, upon their oath aforesaid, further present, that the said Elizabeth, heretofore (to wit) on the 4th day of August, in the eighteenth year of the reign of our late Sovereign Lord, George II., late King of Great Britain, and so forth, at the parish of Lainston, in the county of Southampton, by the name of Elizabeth Chudleigh, did marry the said Augustus John Hervey, and him the said Augustus John Hervey then and there had for her husband; and that the said Elizabeth being married, and the wife of the said Augustus John Hervey, afterwards (to wit) on the eighth day of March, in the ninth year of the reign of our said Sovereign Lord, George III., now King of Great Britain, and so forth, with force and arms, at the said parish of St. George, Hanover Square, in the said county of Middlesex, feloniously did marry, and take to husband the said Evelyn Pierrepont, Duke of Kingston (the said Augustus John Hervey, her former husband, being then alive), against the form of the statute in such case made and provided, and against the peace of our Sovereign Lord, the now King, his Crown and dignity.

Information as to this was sent to the Duchess by her advisers, who told her she must return to answer the charge, as otherwise she would be outlawed. She determined at once to set out for England. She went to her banker at Rome, one Jenkins, to get the money and jewels she had lodged with him. He, first on one pretext, then on another, did not surrender them—it is thought that the delay thus occasioned was brought about at the instance of Medows' agents. Then, one day, the never too mild-tempered lady burst into his room in a violent passion, with a pair of loaded pistols, which she assured him—and her tone carried conviction—she intended to use unless her belongings were immediately forthcoming. There was no further delay.

The Duchess arrived at Calais, weary with the long journey, and rested there a few days. "The Duchess of Kingston, who has been some time at Calais, has a ship of her own, which she sends on her errands to England," &c., Mrs. Delany wrote, absurdly enough. "She expected its return, and, on hearing it was coming

The Duchess of Kingston.

into harbour, she went to the strand immediately on board, and asked the captain 'if he had brought her birds'? 'No, madam, I have not brought your birds, but I have brought Captain Hervey.' Upon which Her graceless Grace hurried out of the ship with all possible speed. I want to hear the sequel; when I do, you shall."

All sorts of rumours were abroad. "The Duchess of Bristol is returned to avoid outlawry," Walpole wrote. "The Earl, whom she has made a dowager, talks and seems to act, resolution of being divorced; and the Ecclesiastical Court, who has been as great a whore as either of them, affects to be ashamed, and thunders against the Duchess. In the meantime the Medowses prosecute the Earl for the whole receipt of the Kingston estate, as Her Grace is his Countess. People cry out that the House of Lords cannot grant a divorce after such symptoms of collusion. I beg their pardons; I do not know what the House cannot do."

On arriving in London the Duchess found herself by no means friendless. Among the first to call on her were the Duchesses of Northumberland, Ancaster, and Portland, and Lord Mountstuart, as well as a host of folk of less eminent social standing. She at once entered an appearance before the Lord Chief Justice—William Murray, Baron (afterwards Earl) Mansfield—in the Court of King's Bench, and gave sureties for her appearance at the trial. The preliminaries dragged on for a long time. "What will be the issue of the suit and lawsuit I cannot tell. As so vast an estate is the prize, the lawyers will probably protract the century."

Elizabeth was in the favourable position that if at the trial she was declared not to be the widow of the Duke of Kingston, then she was beyond question Countess of Bristol. That being so, if the verdict was adverse, she could claim privilege of peerage. In that case, as it was happily put, her Countesshood will save her from being burnt in the hand—then one of the penalties of felony.

Lord Mansfield, who foresaw exactly what would happen, was opposed to proceedings being taken. "The arguments about the place of trial suggest to my mind a question about the propriety of any trial at all," he said during a debate in the House of Lords. "*Cui bono?* What utility is to be obtained? Suppose a conviction be the result? The lady makes your lordships a courtesy, and you return a bow." The Chief Justice was, however, overruled.

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Although the Duchess affected to be anxious that the case should proceed, she nevertheless applied on 22nd December, 1775, for a *nolle prosequi*, on the ground of the sentence of the Consistory Court. The Attorney-General, Thurlow, held that the Crown had no power to grant this, as the offence with which she was charged was created by Act of Parliament, and to stay proceedings would be an infringement of the Bill of Rights.

VII.

There was much argument as to where the trial should be held. A Committee of the House of Peers was appointed to consider the question; it reported that the Chamber of Parliament was inconvenient for the purpose. In the ensuing debate in the Lords, it was decided that the trial would best take place in Westminster Hall, and an Address was presented to the King, desiring that he would be graciously pleased to give directions for a party of Guards to attend on the days of the trial. The opening day, it was agreed, should be 15th April, 1776.

The trial was a tremendous affair—it was the event of the year. A peeress, a reputed Duchess who was at least a Countess, a woman of immense notoriety in more than one country, charged with bigamy, and tried by her peers. There had never before been anything like it, nor was such an affair likely to happen again. Every one begged, coaxed, or threatened those in authority to be allowed to be present. It was joyously anticipated that there would be “scenes” in Court. “Everybody is on the quest for tickets for the Duchess of Kingston’s trial. I am persuaded her impudence will operate in some singular manner. Probably she will appear in weeds with a train to reach across Westminster Hall, with mourning Maids of Honour to support her when she swoons at her dead Duke’s name, and in a black veil to conceal her not blushing,” Walpole wrote in anticipation; but, as a matter of fact, she conducted herself with dignity, as he was presently constrained to admit—“The Duchess-Countess has raised my opinion of her understanding, which was always at a low ebb, for she has behaved so sensibly and with so little affectation that her auditory are loud in applause of her. She did not once squall, scream, or faint, was not impudent nor gorgeous, looked well

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though pale and trembling, was dressed all in black, yet in silk, not *crêpe*, with no pennon hoisted but a widow's peak. She spoke of her innocence and of her awe of so venerable an assembly." So favourably, indeed, was Walpole impressed that he paid her a further compliment—"The doubly noble prisoner went through her part with unusual admiration. Instead of her usual ostentatious folly and clumsy pretensions to cunning, all her conduct was decent, even seemed natural. Her dress was entirely black and plain, her attendants not too numerous, her dismay at first perfectly unaffected. A few tears balanced cheerfulness enough, and her presence of mind and attention never deserted her. This natural behaviour and the pleadings of her counsel, who contended for the finality of the Ecclesiastical Court's solemn injunction against a second trial, carried her triumphantly through the first day, and turned the stream much in her favour."

With what pomp and circumstance, with what elaborate ceremonial, the proceedings were carried out! The Peers assembled in their own House, and marched in solemn procession to Westminster Hall: the Lord High Steward's gentlemen attendants, two and two; the Clerk Assistant to the House of Lords, and the Clerk of the Parliament; the Clerk of the Crown in Chancery, bearing the King's Commission to the Lord High Steward, and the Clerk of the Crown in the King's Bench; the Masters in Chancery, two and two; the Judges, two and two; the Peers' eldest sons, two and two; the Peers minor, two and two; Chester and Somerset Heralds; four Sergeants-at-Arms, with their maces, two and two; the Yeoman-Usher of the House; the Barons, two and two, beginning with the youngest baron; the Bishops, two and two; the Viscounts and other Peers, two and two; the Lord Privy Seal and Lord President of the Council; the Archbishop of York and the Archbishop of Canterbury; four Sergeants-at-Arms, with their maces, two and two; the Sergeant-at-Arms attending the Great Seal, and the Purse-Bearer; Garter King-at-Arms, and the Gentleman-Usher of the Black Rod carrying the White Staff before the Lord High Steward; Henry Earl Bathurst, Chancellor of Great Britain, Lord High Steward, alone, his train borne; His Royal Highness the Duke of Cumberland, his train borne.

"All the world, great and small, are gone to Westminster Hall," Mrs. Delany mentioned. "This accidental rhyme is

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enough to draw me into a poetical rhapsody, and had I as fluent a talent as the author of 'The Election Ball,' I have subjects enough to have added a second part. The solicitude for tickets, the distress of rising early to be in time enough for a place, the anxiety about hairdressers (poor souls hurried out of their lives), mortifications that feathers and flying lappets should be laid aside for that day, as they would obstruct the view from those who sit behind—all these important matters were discussed in my little circle last night. Bernard dined here, Mrs. Boscawen came by appointment in the evening to settle their going together this morning to the trial; here they met at seven, and went together in Mrs. Boscawen's coach. Bernard had his ticket from the Duke of Beaufort. How long it will last nobody knows. I bravely refused a ticket for the Queen's box, and going without dear Duchess, for I feared the bustle my spirits would be in now, unused to such splendid appearances, and doubted whether my eyesight and hearing would have been at all gratified, as both those senses are a little clouded by old Father Time. So I content myself with my own chimney corner, and have resigned my place to one more worthy of it. . . ."

But if Mrs. Delany did not go to the trial, Mrs. Hannah More did.

"I wish it were possible for me to give you the slightest idea of the scene I was present at yesterday," wrote the latter lady. "Garrick would me take his ticket to go to the trial of the Duchess of Kingston—a sight which, for beauty and magnificence, exceeded anything which those who were never present at a Coronation or a trial by Peers can have the least notion of. Mrs. Garrick and I were in full dress by seven; at eight we went to the Duke of Newcastle's house adjoining Westminster Hall, in which he has a large gallery communicating with the apartments in his house. You will imagine the bustle of five thousand people getting into one hall! Yet in all this hurry we walked in tranquilly. When we were all seated, and the King-at-Arms had commanded silence on pain of imprisonment (which, however, was ill observed), the Gentleman of the Black Rod was commanded to bring in his prisoner. Elizabeth, calling herself Duchess-Dowager of Kingston, walked in, led by Black Rod and Mr. Laroche, curtsying profoundly to her Judges. When she bent the Lord Steward called

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out, 'Madam, you may rise,' which, I think, was literally taking her up before she was down. The Peers made her a slight bow. The prisoner was dressed in deep mourning, a black hood on her head, her hair modestly dressed and powdered, a black sacque with crape trimmings, black gauze, deep ruffles, and black gloves. The counsel spoke about an hour and a quarter each. Dunning's manner is insufferably bad, coughing and spitting at every few words; but his sense and his expression pointed to the last degree; he made Her Grace shed bitter tears. I had the pleasure of hearing several of the Lords speak, though nothing more than proposals of common things. Among these were Lyttelton, Talbot, Townshend, and Camden. The fair victim had four virgins in white behind the bar. She imitated her great predecessor, Mrs. Rudd, and affected to write. However, I plainly perceived she only wrote as they do their love epistles on the stage, without forming a letter. I must not omit one of the best things. We had only to open the door to get at a very fine cold collation of all sorts of meats and wines, with tea, &c., a privilege confined to those who belonged to the Duke of Newcastle. I fancy the Peeresses would have been glad of our places at the trial, for I saw Lady Derby and the Duchess of Devonshire with their workbags full of good things. Their rank and dignity did not exempt them from the 'villainous appetites of eating and drinking.' Foote says that the Empress of Russia, the Duchess of Kingston, and Mrs. Rudd are the three most extraordinary women in Europe; but the Duchess disdainfully, and I think unjustly, excludes Mrs. Rudd from the honour of deserving to make one of the triple alliance. The Duchess has but small remains of that beauty of which kings and princes were once so enamoured. She looked very much like Mrs. Pritchard; she is large and ill-shaped. There was nothing white but her face, and had it not been for that she would have looked like a ball of bombazine. There was a great deal of ceremony, a great deal of splendour, and a great deal of nonsense; they adjourned upon the most trivial pretext imaginable, and did nothing with an air of business as was truly ridiculous. I forgot to tell you the Duchess was taken ill, but performed it badly."

The Duchess herself addressed the august assembly at considerable length, and, according to more than one account, with some-

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thing of eloquence. The ordeal must have been considerable, for Walpole relates that she “concluded her rhetoric with a fit and the trial with rage when convicted of bigamy.” “Much cause of speculation—much hurry—has the late grand trial occasioned,” Hannah More wrote on 27th April. “Greatly to the general satisfaction, the shameless Duchess is degraded into as shameless a Countess. Surely there never was so thorough an actress. Garrick says, ‘She has so much out-acted him, it is time for him to leave the stage; but that does her too much honour.’ One should search the jails amongst the perjured notorious offenders for a parallel to such an infamous character. She has, however, escaped the searing of her hand, and is turned over for condign punishment to her conscience! It was astonishing how she was able to speak for three-quarters of an hour, which she did yesterday; but it was labour in vain!”

The full account of the trial being printed in this volume, only a few words about it need be said in this Introduction. In fact, it suffices to say that the marriage of Elizabeth Chudleigh with John Augustus Hervey, the birth of their child, and the registration in 1759 of the marriage were conclusively proved by the evidence of Ann Cradock, Cæsar Hawkins, and the widow of the Rev. Thomas Amis.

The trial which, as has been said, began on 15th April, 1776, continued on 16th, 19th, and 20th April, and was concluded on 22nd April. On the last day the Lord High Steward took the opinion of the Peers assembled, beginning with the youngest of them, John Lord Sundridge (Duke of Argyll in Scotland). Each, standing in his place, uncovered, and laying his right hand on his heart, answered “Guilty, upon my honour”—with the exception of the Duke of Newcastle, who said, “Guilty erroneously, but not intentionally, upon my honour.” The prisoner was summoned, and informed that she had been found guilty of the felony with which she stood indicted. Whereupon she prayed the benefit of the Peerage, according to the statutes. “Madam,” presently said the Lord High Steward, after the point had been referred to the Judges, “the Lords have considered of the prayer you have made, to have the benefit of the statutes, and the Lords allow it you. But, Madam, let me add that, although very little punishment, or none, can be inflicted, the feelings of your own

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conscience will supply that defect. And let me give you this information likewise, that you can never have the like benefit a second time, but another offence of the same kind will be capital. Madam, you are discharged on paying your fees."

So, in the manner Lord Mansfield had predicted, ended this solemn farce.

VIII.

The solemn business of establishing to the satisfaction of everybody that the lady who had been christened Elizabeth Chudleigh was not the Duchess of Kingston, but merely the Countess of Bristol, was now ended. Then arose this question: as she was not the widow of the Duke of Kingston, what about the property he had bequeathed to "my wife," of which she was still in possession? The Medows very naturally took an active interest in this matter. They caused a writ of *ne exeat regno* to be issued; but news of this being conveyed to the Duchess (as she still called herself—and, therefore, so will we), she hastened to Dover, and went to Calais as quickly as possible. According to one of her biographers, "she caused her carriage to be driven about the most public streets of the metropolis, invited a select party to dine at Kingston House, the better to cover her design, while in a hired post chaise she travelled to Dover. Mr. Harding, the captain of her yacht, was there, and he conveyed her in the first open boat that could be procured to Calais."

Whitehead gives a slightly different version of her escape. "As she was never at a loss for contrivances, she now planned her escape," he wrote. "She invited a large party of friends to dine with her on the day after the trial ended. Having previously arranged matters for her journey, the instant Sir Francis discharged his prisoner she departed in Sir James Laroche's carriage to Dover, where her packet waited to take her to France. The next day her own *vis-à-vis* was seen driving about the London streets with Miss Belle Chudleigh, her cousin, and another lady. The Duchess's carriage being so well known, and Miss Belle so like Her Grace, many considerable bets were lost by people who believed her to be the Duchess."

The Duchess (as she may as well be styled for the rest of the story) proposed to stay at Dessein's Hotel, whose hotel has been



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immortalised by Sterne, Brummell, and Thackeray. The story goes that on her arrival there, the proprietor, who had heard of the trial, and believed that the verdict deprived her of all her goods and chattels, told her that his establishment was full. "He was highly honoured in the choice she had made of his hotel, but *mon Dieu!*—how unfortunate it was that he could not accommodate her with a suite of rooms! Had he only been apprised of her intention to do him the favour! Now, a single apartment was all the accommodation in his power." While Her Grace was resting after her journey in the "single apartment," Dessein learnt that he had been misinformed as to her means, and hastened to inform her that "the company who had occupied apartments suitable in every respect *pour Madame la Duchesse*, were gone to Paris, and, consequently, they were devoted to her use, if she should so please." Dessein, who would appear to have been a thorough-paced scoundrel, made himself so agreeable to Her Grace that she lent him a thousand pounds—which sum he certainly never repaid in its entirety. Presently, wearying of Dessein's extortionate charges, the Duchess rented from M. Cocove, some time President of the town municipality of Calais, a house a few miles from the sea, where she stayed for a while.

It was not long before the Duchess was bored with Calais, which place, indeed, offered few distractions. She set out for places where the society was more bright and congenial. In November, 1776, she arrived at Munich, where she met her friend, the Electress Dowager of Saxony, who was on a visit to her brother, the Elector of Bavaria. The Elector, at the instance of his sister, bestowed upon her the title of Countess of Warth. The Duchess, whose perseverance may be deplored, but must be admired, now wrote to the Grande Maîtresse at the Court of Vienna, to ask her to arrange for her presentation as Duchess of Kingston, in case the British Minister, Sir Robert Murray Keith, should decline to do so. There arose a tremendous pother, for, while showing the utmost courtesy, Keith refused absolutely to present her as Duchess of Kingston, though he expressed himself willing to do so as Countess of Bristol. The Empress, of course, could not receive her at Court, except at the instance of the British Minister.

It must be placed to the credit of the Duchess that she was a

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doughty fighter. She threatened Keith that he would have to answer at the bar of the House of Lords for a breach of privilege. She induced the Nuncio to approach the Pope to intervene, and request the Empress Maria Theresa to receive her. She declared that the King of England and many Peers were intriguing against her, and that these personages had influenced the decision of the House of Lords at her trial. She had translated into Latin and also into French the sentence of the Consistory Court, which declared that she was free from all matrimonial contract—she even improved upon the original—and she caused the leaflets to be widely distributed.

As proof of her indomitable spirit, the following story (printed in the “ Authentic Particulars ”) may be given:—“ The Duchess was preparing to leave Vienna, and had actually got into her coach; but having left a tradesman’s bill unpaid, on account of a difference of between three and four ducats, which the man had insisted was just, Her Grace would not pay any part of his bill, notwithstanding he had proposed to have the same taxed by tradesmen or settled by magistrates. To this she would not listen; and the dispute rested in that state till the day she intended to leave Vienna and bilk him. The time of her departure the man got scent of, and, accordingly, on the instant the coach was setting off, a party of soldiers surrounded the carriage, aided by an officer of the law, who arrested her, and she was obliged to alight. A guard was placed over the carriage and baggage. This disgrace, by some minds, would have been severely felt, but in the Duchess it only served to heighten her baseness; for, instead of preventing her detention, by immediately discharging the bill (which had been allowed to be just by all who saw her), Her Grace determined to litigate the claim, and submitted to be detained three days for that purpose, when she was condemned to pay the full amount of the bill, with all costs and expenses.”

Lord Bristol now made another effort to secure a divorce. As a preliminary step, he obtained the recognition of his marriage from the Consistory Court on 22nd January, 1777. So strong, however, was the evidence of his collusion in the earlier action that he accepted very reluctantly the advice to proceed no further in the matter.

For some time past the Duchess had looked forward to a visit to St. Petersburg, and now she decided to put her project into

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execution. It has been mentioned that the Duchess had earlier met Prince Radzivil, who had been attracted by her. When she was going to St. Petersburg she informed him of her advent. He invited her to visit him at Berge, a village about 40 miles from Riga. There she was met by an officer in his retinue, who told her that the Prince proposed to visit her without ceremony. So he came the next morning with forty carriages, each drawn by six horses, the different vehicles containing, it is related, "his nieces, the ladies of the principality, and other illustrious characters; in addition to these, there were six hundred horses led in train, a thousand dogs, and several boars; a guard of Hussars completed the suite." He gave a party in her honour, and presented her with "a magnificent topaz ring, boxes, trinkets of all descriptions." A chronicler says with caustic humour—"The Duchess, through life, had been accustomed to receive presents; and a great deal of her personal property was acquired in this way." Nor was this all. "The feast," thus the writer of the "Authentic Particulars," "was followed by a boar hunt, for the purpose of which the dogs had been brought. The hunt was in a wood, at night. A regiment of Hussars, with lighted torches in their hands, formed a circle, within which were huntsmen, also with torches. The boar, thus surrounded by fire, was intimidated, and, after the usual sport, he fell a victim to his pursuers. At this hunt attended a numerous party of the Polish nobility. During fourteen days, the time of the Duchess's continuance with Prince Radzivil, she dined and slept in different houses belonging to the Prince. As the retinues moved from place to place they, on every third or fourth day, met a camp, formed of the Prince's own guard. Travelling at night from Niccissius, the roads were illuminated, guards accompanied as escorts, and, on the arrival of the Duchess at the different towns belonging to the Duchy of the Prince, the magistrates waited on her with their congratulations, and the cannons were fired. Here was transporting satisfaction!" These lavish attentions, it may be thought, should have pleased her. "And yet," continues the chronicler, "such was the oddity of the Duchess, so unique was she in character, mind, and feeling, that, at the moment of her being complimented with a *feu de joie*, she only then expressed her sentiments of the princely treatment—'He may fire as much as he pleases, but he shall not hit my mark.'" For "oddity" read "shrewdness."

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The Duchess was under no illusions. She was vastly wealthy, and she had, so far as possible, kept to herself the fact that the bulk of her fortune went from her if she married again.

She was anxious to avert any trouble about her presentation at the Russian Court, and, remembering her trouble at Vienna, she proposed to pave the way by just a little judicious bribery. She was told that Count Chernicheff, a favourite at Court, was the best person to be of assistance, and, to enlist his good offices, she sent him two pictures from the Duke's collection. She was unaware that these pictures were respectively by Raphael and Claude Lorraine. Chernicheff, who was not ignorant of art, assured her that he was overwhelmed with her generosity, for, he told her, that her gift had been estimated by experts as being of the value of ten thousand pounds sterling. It is not surprising that the donor was dismayed; but she, who had been in tight corners before, quickly recovered herself and said that these paintings were particularly the favourites of her departed husband, and that the Count was extremely gracious in permitting them to occupy a space in his palace, until her mansion was properly prepared for decoration. The Count, however, did not see eye to eye with her in this matter, and retained them. In her will she made special reference to the pictures—"I give and bequeath as an act of justice to Charles Medows to be reputed an heirloom of Thoresby the two pictures which are in the possession of the Count de Chernicheff, through the misunderstood interpretation of a letter which he received and which he maintains to have been presented to him, *viz.*, one of the said pictures known and attested by Charles Marriot for an original of Raphael, the Holy Family, and the other a Claude Lorraine. It is said in the said letter that these two pictures were much esteemed and admired by the late Duke of Kingston. I set a great value on them, and I trusted them to his care, the expression in French was, *Je vous les confie* (I trust them to you). This circumstance can be attested by Major Moreau, at that time my secretary, who wrote that letter signed by me. They have been demanded and refused several times, and particularly once by my painter, Mr. le Save, who presented the request in writing signed by me." On the rights and wrongs of this affair it is impossible now to express an opinion; but, in any case, it is evident that Chernicheff was a sorry fellow.

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Royalty in Russia was at that time truly royal. The British Ambassador, Sir James Harris (afterwards created Earl of Malmesbury), declined officially to receive the Duchess, but the Czarina took her under her protection. When Her Grace's yacht (on which she had travelled from France) was severely damaged by a hurricane, it was repaired by the express order of Her Majesty. Also, the Czarina assigned a mansion for her residence. It was hinted to the Duchess that her royal host was desirous to bestow upon her an Imperial Order, but that this could only be given to one who owned property in Russia. The vanity of the Duchess was tickled. She purchased for £12,000 an estate near St. Petersburg, which she named "Chudleigh"—only to learn that foreigners could not be admitted to the Order. "What was to be done with the estate?" says the writer of the "Authentic Particulars." "Besides catching fish and cutting down wood, it promised not to turn to any advantageous account. The Duchess, however, ever disposed to be misled when flattered by following her own inclination, was induced to believe that a fortune, which she did not want, might be obtained by a means which she had not occasion to use, which was the erection of works for making brandy. This was a whimsical transition of ideas, and such as could not easily be reconciled by an ordinary mind. A distiller of spirits, instead of the wearer of a pendant Order of the picture of an Empress!"

The Duchess was restless, and could not long remain in any one place. She left St. Petersburg for Paris, where she purchased a house at Montmartre and a mansion at St. Assize, near Paris, which was the property of Monsieur, the King's brother. The price was £50,000; but it would appear that at the time of her death she had only paid £15,000 on account.

Her circle of acquaintances became more and more peculiar. Among those that she patronised was that despicable adventurer, "Major" James George Semple. Plausible he was no doubt, and reasonably good-looking, if an etching by Barlow showing him standing in the dock at the Old Bailey can be trusted. "In the enumeration of her purse-leeches," says the author of the "Authentic Particulars," "we find that human blood-sucker, Major Semple, whom she liberated from Calais prison; and it was termed, by the undiscerning, an act of generosity. But the fact is that the Duchess, hearing of the confinement of the man, declared, in a moment, that she would contrive to have him released;

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and the method she proposed was to bribe the prison guards, saw the iron bars of the window of his room, and thus effect an escape. This stratagem busied the Duchess for a week; the creditors of Semple all the time supposing that Her Grace was calculating the amount of their demands, in order to discharge them. The project of an escape being defeated, the Duchess found herself to be so embarrassed in the business that she was compelled to do something to gratify the expectations which her officious interference had raised. A trifle was divided among the creditors, and Mr. Semple was shipped to England, to prosecute his depredations on the honest part of the community." According to the "Memoirs" of "The Northern Imposter," as Semple came to be called, Mrs. Semple was a god-daughter of the Duchess. "It need scarcely be told," says the biographer, "that that lady is a very great favourite with the still greater Empress of Russia, at which Court the first great lady now resides. To conceive that J. G. Semple would let slip so favourable an opportunity of improving his fortunes would be but paying a very bad compliment to his penetration. As he knew the alliance, so he knew well how to introduce himself. Mr. Semple was a fine man; the lady had been a fine woman, and is still a great wit. She received him with hospitality, and promised to introduce him to the Empress. The promise of a Court lady was never yet violated. Mr. Semple was introduced, and promised promotion. But strange was the revolution in the affairs of Mr. Semple. A something, a destiny which we all are liable to, threw a stumbling-block in his way. The Duchess withdrew her favours, the Empress recanted her promise, and Mr. Semple decamped without waiting for the expected promotion." How he bungled his chances is explained later. "By the recommendation of the Duchess of Kingston," so the narrative has it, "he came to St. Petersburg, and by her interest he obtained the rank of Major in the Russian service. He went to the Crimea with Prince Potemkin as his aide-de-camp. On Mrs. Semple's writing to her husband, complaining of the Duchess of Kingston slighting her, he returned to St. Petersburg, and by a great deal of bluster so frightened her that he obliged the Duchess, before he left the house, to give him 500 roubles (about 3s. 6d. each). He stayed afterwards in St. Petersburg; but before he left the place sold his carriage to four different Russian noblemen, took the cash off each of them, and promised to send the carriage

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to each." After many crimes he was sentenced in England to several years' transportation, and, returning, was committed to Tothill Fields prison.

At St. Petersburg the Duchess met an English journeyman carpenter, whom she appointed steward of "Chudleigh," and left in charge of the estate in her absence; and elsewhere she added to her suite quaint folk. She became acquainted with a man who announced himself as an Albanian Prince, but who was, in fact, a notorious adventurer, called Wortá, who preyed upon her. He was presently apprehended for forgeries in Hungary, and poisoned himself in prison. There is a brief account of him in the "Authentic Particulars"—"Wortá, whoever he might be, was entitled to praise as a man of talents. During the contest between Great Britain and America he wrote several little pieces in support of what he termed 'The honourable cause of *les pauvres Américains*.' Besides this subject there is a small tract by Wortá, entitled, '*L'Horoscope Politique*' . . . There is also another small production, containing a selection of poetic pieces, professedly translated from a Turkish author, but really written by Wortá. His language in prose is energetic in the extreme, in poetry it is mel-liferous and full of tenderness. He had certainly strong feelings and a very superior understanding. To each of his publications there is an engraving of himself prefixed, which is encircled by stars and rays from a small represented sun darting on the top of his head. He was, altogether, a most extraordinary character." There is no doubt that the Duchess made him valuable gifts, but even her infatuation did not lead her appreciably to despoil herself. In fact, it is more than likely that he felt himself ill-remunerated for dancing attendance on a wealthy woman approaching threescore years and ten.

The Duchess lived as scandalously in her old age as in her youth. Her vanity increased with her years, and she was always accessible to those who flattered her. Any adventurer who made love to her found a warm welcome, and she was surrounded by persons who battered on her. Parsimonious as she was in other respects, she was always prepared to pay lavishly for her personal gratification.

"As in life, so in death, this lady was eccentric," wrote the author of "Authentic Particulars." "The day before her demise she ate a brace of partridges, and some other game; she expired,

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having scarcely swallowed two large bumpers of Madeira. Except an attack at Petersburg, when an epidemic disease prevailed, and the fever with which she was seized on her return from Rome to meet her trial, she experienced not an illness of a day. The method she took to preserve health was that of braving every element. The severest cold neither impeded her journey nor discomposed her feelings. Fires, in her apartments, were rather in conformity to established usage than as necessities for herself; and, as a proof of her exemption from all medical rule, she almost totally reversed order in everything. Late she retired to rest; early she arose. For a slight indication of the gout, she instantly plunged her feet in cold water; and phlebotomy, whether proper or not, was the universal recipe to which, on every indication of malady, she resorted."

She passed away on 26th August, 1788, at her estate of St. Assize, in her sixty-ninth year. According to one account the immediate cause of death was the breaking of a blood-vessel as the result of a violent outburst of rage on hearing that a lawsuit in Paris had gone against her.

There is perhaps no better way in which to take leave of the Duchess than in the words of Horace Walpole—"I can tell you nothing more extraordinary, nor would any history figure near hers. It shows genius to strike out anything so new as her achievements. Though we have so many uncommon personages, it is not easy for them to be so superiorly particular."

Leading Dates in Duchess of Kingston Trial.

1720 (?)		Birth.
1740 (?)		Maid of Honour to Augusta, Princess of Wales.
1743		James, sixth Duke of Hamilton, proposes marriage.
1744, August	4	Secretly marries the Hon. Augustus John Hervey.
1747, November	2	Son, Henry Augustus Hervey, baptised.
1750, <i>circa</i>		Liaison with Evelyn, second Duke of Kingston.
1765, February		Goes abroad.
1766 (?)		Returns.
1768		Hervey takes proceedings for divorce.
1769, February		Institutes successfully suit for jactitation of marriage.
	March	8 Marries the Duke of Kingston.
1773, September	23	Death of the Duke of Kingston.
1774		Travels abroad.
	July	Evelyn Medows disputes the Duke's will. Pays a flying visit to London.
1775		Attempted blackmail of Samuel Foote.
	March	18 Hervey succeeds to Earldom of Bristol. Proceedings for bigamy begun. Grand Jury find a True Bill.
	December	22 Unsuccessful application for a <i>nolle prosequi</i> .
1776, April	15	Trial for bigamy begins in the House of Lords.
	22	Found guilty, but, pleading benefit of peerage, discharged.
	May	Goes abroad.
1788, August	26	Death.

THE TRIAL.

First Day—Monday, 15th April, 1776.

In the Court erected in WESTMINSTER HALL, for the Trial of ELIZABETH Duchess Dowager of KINGSTON for Bigamy.

About ten of the clock the Lords came from their own House into the Court erected in Westminster Hall, for the trial of Elizabeth Duchess Dowager of Kingston.

The Lords being placed in their proper seats, and the Lord High Steward upon the Woolpack, the House was resumed.

The Clerk of the Crown in Chancery, having his Majesty's Commission to the Lord High Steward in his hand, and the Clerk of the Crown in the King's Bench, standing before the Clerk's table with their faces towards the State, made three reverences; the first at the table, the second in the midway, and the third near the Woolpack; then kneeled down; and the Clerk of the Crown in Chancery, on his knee, presented the Commission to the Lord High Steward, who delivered the same to the Clerk of the Crown in the King's Bench to read; then rising, they made three reverences, and returned to the table. And then proclamation was made for silence, in this manner:

SERJEANT-AT-ARMS—Oyez, oyez, oyez! Our Sovereign Lord the King strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Lord High Steward stood up, and spoke to the Peers.

LORD HIGH STEWARD—His Majesty's Commission is about to be read; your Lordships are desired to attend to it in the usual manner; and all others are likewise to stand up uncovered while the Commission is reading.

All the Peers uncovered themselves; and they, and all others, stood up uncovered, while the Commission was read.

GEORGE R.

George III., by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth. To our right trusty and right well-beloved cousin and counsellor, Henry Earl Bathurst, our Chancellor of Great Britain, greeting. Know ye, that whereas Elizabeth, the wife of Augustus John Hervey, late of the parish of Saint George, Hanover Square, in our county of Middlesex, Esquire, before our Justices of Oyer and Terminer, at Hicks' Hall, in Saint John Street, in and for our county of

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Middlesex, upon the oath of twelve jurors, good and lawful men of the said county of Middlesex, then and there sworn and charged to inquire for us for the body of the said county, stands indicted of polygamy and feloniously marrying Evelyn Pierrepont, late Duke of Kingston, she being then married, and the wife of the said Augustus John Hervey: we, considering that justice is an excellent virtue, and pleasing to the Most High, and being willing that the said Elizabeth, of and for the felony whereof she is indicted as aforesaid, before us, in our present Parliament, according to the law and custom of our Kingdom of Great Britain, may be heard, examined, sentenced, and adjudged; and that all other things which are necessary in this behalf may be duly exercised and executed; and for that the office of High Steward of Great Britain (whole preference in this behalf is required) is now vacant (as we are informed), we, very much confiding in your fidelity, prudence, provident circumspection, and industry, have for this cause ordained and constituted you Steward of Great Britain, to hear, execute, and exercise for this time the said office, with all things due and belonging to the same office in this behalf: and therefore we command you, that you diligently set about the premises, and for this time do exercise and execute with effect all those things which belong to the office of Steward of Great Britain, and which are required in this behalf. In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the 15th day of April, in the sixteenth year of our reign.

By the King himself, signed with his own hand.

YORKE,

Serjeant.

SERJEANT-AT-ARMS—God save the King!

Then Garter, and the Gentleman-Usher of the Black Rod, after three reverences, kneeling, jointly presented the White Staff to His Grace the Lord High Steward; and then His Grace, attended by Garter, Black Rod, and the Purse-Bearer (making his proper reverences towards the throne) removed from the Woolpack to an armed chair, which was placed on the uppermost step but one of the throne, as it was prepared for that purpose; and then seated himself in the chair, and delivered the staff to the Gentleman-Usher of the Black Rod on his right hand, the purse-bearer holding the purse on his left.

CLERK OF THE CROWN—Serjeant-at-Arms, make proclamation.

SERJEANT-AT-ARMS—Oyez, oyez, oyez. Our Sovereign Lord the King strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Clerk of the Crown, by direction of the Lord High Steward, read the certiorari, and the return thereof, together with the caption of the indictment, and the indictment certified there-

The Duchess of Kingston.

upon, against Elizabeth Duchess Dowager of Kingston; *in hæc verba*:

George III., by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth. To our Justices of Oyer and Terminer at Hicks' Hall, in Saint John Street, in and for our county of Middlesex, and to every of them, greeting. We being willing, for certain reasons us thereunto moving, that all and singular indictments of whatsoever felonies whereof Elizabeth, calling herself Duchess Dowager of Kingston, by the name of Elizabeth, the wife of Augustus John Hervey, late of the parish of Saint George, Hanover Square, in the county of Middlesex, Esquire, is indicted before you (as is said) be determined before us in our Parliament, and not elsewhere; do command you and every of you, that you or one of you do send under your seals, or under the seal of one of you, before us in our present Parliament, immediately after the receipt of this our writ, all and singular the indictments aforesaid, with all things touching the same, by whatsoever name the said Elizabeth is called in the same, together with this writ, that we may cause further to be done thereon, what of right and according to the law and custom of England we shall see fit to be done. Witness ourself at Westminster, the 11th day of November, in the sixteenth year of our reign.

YORKE.

To the Justices of Oyer and Terminer, at Hicks' Hall, in Saint John Street, in and for the county of Middlesex, and to every of them, a writ of certiorari to certify into the Upper House of Parliament the indictment found against Elizabeth, calling herself Duchess Dowager of Kingston, by the name of Elizabeth, wife of Augustus John Hervey, for bigamy, returnable immediately before the King in Parliament.

YORKE.

By order of the Lords Spiritual and Temporal in Parliament assembled.

The execution of this writ appears by the schedules and indictment to this writ annexed.

The answer of Sir JOHN HAWKINS, Knight, one of the Justices
within written—

MIDDLESEX.

Be it remembered, that at the General Session of Oyer and Terminer of our Lord the King, holden for the county of Middlesex at Hicks' Hall, in Saint John Street, in the said county, on Monday the 9th day of January, in the fifteenth year of the reign

The Trial.

of our Sovereign Lord George III., King of Great Britain, and so forth, before Sir John Hawkins, Knight, John Cox, David Wilmot, John Brettell, Esquires, and others their Fellows-Justices of our said Lord the King, assigned by His Majesty's letters patent under the great seal of Great Britain directed to same Justices before named, and others in the said letters named, to inquire more fully the truth by the oath of good and lawful men of the said county of Middlesex, and by other ways, means, and methods by which they shall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treasons, misprisions of treason, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the money of Great Britain and other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceits, and all other evil doings, offences, and injuries whatsoever, and also the accessories of them, within the county aforesaid (as well within liberties as without), by whomsoever and in what manner soever done, committed, or perpetrated, and by whom or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises, and every of them, or any of them, in any manner whatsoever, and the said treasons and other the premises to hear and determine according to the laws and customs of England, by the oath of John Tilney, James Stafford, Richard Phillips, Samuel Stable, Samuel Bird, William Hilliar, Paul Barbot, William Weatherill, Thomas Waddell, John Williams, Samuel Baker, Thomas Sheriff, John Leicester, Thomas Tanton, John Goodere, John Thomas, and Robert Davis, gentlemen, good and lawful men of the county aforesaid, now here sworn and charged to inquire for our said Lord the King for the body of the same county; it is presented in manner and form as appears by the indictment and schedules hereunto annexed. BUTLER.

George III., by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth. To our Justices of Oyer and Terminer, at Hicks' Hall, in Saint John Street, in and for our county of Middlesex, and to every of them, greeting. Whereas by our writ we have lately commanded you, and every of you, for certain reasons, you or one of you should send under your seals, or the seal of one of you, before us at Westminster, immediately after the receipt of that writ, all and singular indictments of whatsoever trespasses, contempts, and felonies whereof Elizabeth, the wife of Augustus John Hervey,

The Duchess of Kingston.

Esquire, was indicted before you (as was said), with all things touching the same, by whatsoever name the said Elizabeth should be called therein, together with the said writ to you directed, that we might further cause to be done thereon what of right and according to the law and custom of England we should see fit to be done: and we do, for certain reasons us thereunto moving, command you and every of you, that you or one of you do wholly supersede whatsoever is to be done concerning the execution of that our said writ; and that you proceed to the determination of the trespasses, contempts, and felonies aforesaid with that expedition which to you shall seem right and according to the law and custom of England, notwithstanding our writ as before sent to you directed for that purpose. Witness William Lord Mansfield at Westminster, the 23rd day of May, in the fifteenth year of our reign.

BURROW.

Received 13th June, 1775. C.E.

By the Court.

By rule of Court.

George III., by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith. To our Justices of Oyer and Terminer, at Hicks' Hall, in Saint John Street, in and for our county of Middlesex, and to every of them, greeting. We being willing, for certain reasons, that all and singular indictments of whatsoever trespasses, contempts, and felonies whereof Elizabeth, the wife of Augustus John Hervey, Esquire, is indicted before you (as is said) be determined before us, and not elsewhere, do command you and every of you, that you or one of you do send under your seals, or the seal of one of you, before us at Westminster, immediately after the receipt of this our writ, all and singular the said indictments, with all things touching the same, by whatsoever name the said Elizabeth may be called in the same, together with this our writ, that we may further cause to be done thereon what of right and according to the law and custom of England we shall see fit to be done. Witness William Lord Mansfield at Westminster, the 18th day of May, in the fifteenth year of our reign.

BURROW.

By the Court.

At the instance of the within-named defendant, by rule of Court.

The execution of this writ appears by the schedules and indictment to this writ annexed.
The answer of Sir JOHN HAWKINS, Knight, one of the Justices within written—

MIDDLESEX.

Be it remembered, that at the General Session of Oyer and Terminer of our Lord the King, holden for the county of Middlesex

The Trial.

at Hicks' Hall, in Saint John Street, in the said county, on Monday, the 9th day of January, in the fifteenth year of the reign of our Sovereign Lord George III., King of Great Britain, and so forth, before Sir John Hawkins, Knight; Sir James Esdaile, Knight; David Wilmot, John Machin, Esquires; and others their Fellows-Justices of our said Lord the King, assigned by His Majesty's letters patent under the great seal of Great Britain directed to the same Justices before named, and others in the said letters named, to inquire more fully the truth, by the oath of good and lawful men of the county of Middlesex aforesaid, and by other ways, means, and methods by which they shall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treasons, misprisions of treason, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the money of Great Britain and other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligencies, concealments, maintenances, oppressions, champarties, deceits, and all other evil doings, offences, and injuries whatsoever, and also the accessories of them, within the county aforesaid (as well within liberties as without), by whomsoever and in what manner soever done, committed, or perpetrated, and by whom or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises and every of them or any of them, in any manner whatsoever; and the said treasons and other the premises to hear and determine according to the laws and customs of England, by the oath of John Tilney, James Stafford, Richard Phillips, Samuel Stable, Samuel Bird, William Hilliar, Paul Barbot, William Weatherill, Thomas Waddell, John Williams, Samuel Baker, Thomas Sheriff, John Leicester, Thomas Tanton, John Goodere, John Thomas, and Robert Davis, gentlemen, good and lawful men of the county aforesaid, now here sworn and charged to inquire for our said Lord the King for the body of the same county: it is presented in manner and form as appears by a certain bill of indictment to this schedule annexed.

BUTLER.

George III., by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth. To the Sheriff of our county of Middlesex, greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you take Elizabeth, wife of Augustus John Hervey, late of the parish of St. George, Hanover Square, in the county of Middlesex, Esquire, if she shall be found in your bailiwick, and her safely keep, so that you may have her body before our Justices

The Duchess of Kingston.

assigned by our letters patent under our great seal of Great Britain, to inquire more fully the truth, by the oath of good and lawful men of our county of Middlesex aforesaid, and by other ways, means, and methods by which they shall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treasons, misprisions of treason, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the money of Great Britain and other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligencies, concealments, maintenances, oppressions, champarties, deceits, and all other evil doings, offences, and injuries whatsoever, and also the accessories of them, within the county aforesaid (as well within liberties as without), by whomsoever and in what manner soever done, committed, or perpetrated, and by whom or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises and every of them or any of them, in any manner whatsoever; and the said treasons and other the premises to hear and determine according to the laws and customs of England, at the next General Session of Oyer and Terminer to be holden for our said county, to answer us concerning certain felonies whereof she is indicted before our said Justices; and have you then there this writ. Witness Sir John Hawkins, Knight, at Hicks' Hall, the 9th day of January, in the fifteenth year of our reign.

BUTLER.

The within-named Elizabeth, wife of Augustus John Hervey, is not found in my bailiwick.

The answer of

WILLIAM PLOMER, Esquire, }
and } Sheriff.
JOHN HART, Esquire, }

George III., by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth. To the Sheriff of our county of Middlesex, greeting. We command you, as before we have commanded you, that you omit not, by reason of any liberty in your bailiwick, but that you take Elizabeth, the wife of Augustus John Hervey, late of the parish of Saint George, Hanover Square, in the County of Middlesex, Esquire, if she shall be found in your bailiwick, and her safely keep, so that you have her body before our Justices assigned by our letters patent under our great seal of Great Britain, to inquire more fully the truth, by the oath of good and lawful men of our county of Middlesex aforesaid,

The Trial.

and by other ways, means, and methods by which they shall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treasons, misprisions of treason, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the money of Great Britain, and other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceits, and all other evil doings, offences, and injuries whatsoever, and also the accessories of them, within the county aforesaid (as well within liberties as without), by whomsoever and in what manner soever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises, and every of them or any of them, in any manner whatsoever; and the said treasons and other the premises to hear and determine, according to the laws and customs of England, at the next General Session of Oyer and Terminer to be holden for our said county, to answer us concerning certain felonies whereof she is indicted before our said Justices; and have you then there this writ. Witness Sir John Hawkins, Knight, at Hicks' Hall, the 14th day of February, in the fifteenth year of our reign.

BUTLER.

The within-named Elizabeth, the wife of Augustus John Hervey, is not found in my bailiwick.

The answer of

WILLIAM PLOMER, Esquire,
and
JOHN HART, Esquire, } Sheriff.

MIDDLESEX.

The Jurors for our Sovereign Lord the now King, upon their oath present, that Elizabeth, the wife of Augustus John Hervey, late of the parish of Saint George, Hanover Square, in the county of Middlesex, Esquire, on the 8th day of March, in the ninth year of the reign of our Sovereign Lord George III., now King of Great Britain, and so forth, being then married, and then the wife of the said Augustus John Hervey, with force and arms at the said parish of Saint George, Hanover Square, in the said county of Middlesex, feloniously did marry and take to husband Evelyn Pierrepont Duke of Kingston (the said Augustus John Hervey, her former husband, being then alive) against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his Crown and dignity; and the said jurors for our said Sovereign Lord the now King, upon their oath aforesaid

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further present, that the said Elizabeth, heretofore (to wit) on the 4th day of August, in the eighteenth year of the reign of our late Sovereign Lord George II., late King of Great Britain, and so forth, at the parish of Lainston, in the county of Southampton, by the name of Elizabeth Chudleigh, did marry the said Augustus John Hervey, and him the said Augustus John Hervey then and there had for her husband; and that the said Elizabeth being married, and the wife of the said Augustus John Hervey, afterwards (to wit) on the 8th day of March, in the ninth year of the reign of our said Sovereign Lord George III., now King of Great Britain, and so forth, with force and arms, at the said parish of Saint George, Hanover Square, in the said county of Middlesex, feloniously did marry and take to husband the said Evelyn Pierrepont Duke of Kingston (the said Augustus John Hervey, her former husband, being then alive) against the form of the statute in such case made and provided, and against the peace of our said Sovereign Lord the now King, his Crown and dignity.

O. T.

True Bill.

Augustine Greenland,
Ann Cradock,
Christopher Dixon,

Thomas Dodd,
Samuel Harper,
John Fozard.

Sworn in Court.

LORD HIGH STEWARD—Is it your Lordships' pleasure that the Judges have leave to be covered?

LORDS—Ay, ay.

CLERK OF THE CROWN—Serjeant-at-arms, make proclamation for the Gentleman Usher of the Black Rod to bring his prisoner to the bar.

SERJEANT-AT-ARMS—Oyez, oyez, oyez! Elizabeth Duchess Dowager of Kingston, come forth and save you and your bail, or else you forfeit your recognisance.

[After her surrender she was, during the trial, called to the bar by the following proclamation.]

Gentleman-Usher of the Black Rod, bring your prisoner, Elizabeth Duchess Dowager of Kingston, to the bar, pursuant to the order of the House of Lords.

Then Elizabeth Duchess Dowager of Kingston was brought to the bar by the Deputy Gentleman-Usher of the Black Rod. The prisoner, when she approached the bar, made three reverences, and then fell upon her knees at the bar.

LORD HIGH STEWARD—Madam, you may rise.

The prisoner then rose up, and curtsied to His Grace the Lord High Steward and to the House of Peers, which compliment was returned her by His Grace and the Lords.

Then, proclamation having been made again for silence, the Lord High Steward spake to the prisoner, as follows:—

The Trial.

LORD HIGH STEWARD—Madam, you stand indicted for having married a second husband, your first husband being living. A crime so destructive of the peace and happiness of private families, and so injurious in its consequences to the welfare and good order of society, that by the statute law of this kingdom it was for many years (in your sex) punishable with death; the lenity, however, of later times has substituted a milder punishment in its stead. This consideration must necessarily tend to lessen the perturbation of your spirits upon this awful occasion. But that, madam, which, next to the inward feelings of your own conscience, will afford you most comfort is reflecting upon the honour, the wisdom, and the candour of this High Court of criminal jurisdiction. It is, madam, by your particular desire that you now stand at that bar; you were not brought there by any prosecutor.

In your petition to the Lords, praying for a speedy trial, you assumed the title of Duchess Dowager of Kingston, and it was by that title that the Court of King's Bench admitted you to bail; in your petition you likewise averred that Augustus John Hervey, whose wife the indictment charges you with being, is at this time Earl of Bristol: upon examining their records the Lords were satisfied of the truth of that averment; and have accordingly allowed you the privilege you petitioned for, of being tried by your Peers in full Parliament; and from them you will be sure to meet with nothing but justice tempered with humanity.

Before I conclude I am commanded by the House to acquaint you, madam, and all other persons having occasion to speak to the Court during the trial, that they are to address themselves to the Lords in general, and not to any Lord in particular.

DUCHESS OF KINGSTON—My Lords, I, the unfortunate widow of your late brother, the Most Noble Evelyn Pierrepont Duke of Kingston, am brought to the bar of this Right Honourable House without a shadow of fear, but infinitely awed by the respect that is due to you, my most Honourable Judges.

My Lords, after having, at the hazard of my life, returned from Rome in a dangerous sickness to submit myself to the laws of my country, I plead some little merit in my willing obedience; and I entreat your Lordships' indulgence, if I should be deficient in any ceremonial part of my conduct towards you, my most honoured and respectable Judges; for the infirmities of my body and the oppression of spirits under which I labour leave your unhappy prisoner sometimes without recollection; but it must be only with the loss of life that I can be deprived of the knowledge of the respect that is due to this high and awful Tribunal.

LORD HIGH STEWARD—Madam, your Ladyship will do well to give attention, while you are arraigned on your indictment.

[Then proclamation was made for silence.

After which Elizabeth Duchess Dowager of Kingston was

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arraigned, in the form of the said indictment against her, by the Clerk of the Crown in the King's Bench.]

Elizabeth Duchess Dowager of Kingston, you stand indicted by the name of Elizabeth, the wife of Augustus John Hervey, late of the parish of Saint George, Hanover Square, Esquire (now become a Peer of this realm), for that you, on the 8th day of March, in the ninth year of the reign of his present Majesty our Sovereign Lord King George III., being then married, and then the wife of the said Augustus John Hervey, with force and arms, at the said parish of Saint George, Hanover Square, in the said county of Middlesex, feloniously did marry and take to husband Evelyn Pierrepont Duke of Kingston, the said Augustus John Hervey, your former husband, being then alive, against the form the statute in such case made and provided, and against the peace of our said Lord the King, his Crown and dignity.

The indictment further charges, that you the said Elizabeth, heretofore, to wit, on the 4th day of August, in the eighteenth year of our late Sovereign Lord George II., late King of Great Britain, and so forth, at the parish of Lainston, in the county of Southampton, by the name of Elizabeth Chudleigh, did marry the said Augustus John Hervey, and him the said Augustus John Hervey then and there had for your husband; and that you the said Elizabeth, being married, and the wife of the said Augustus John Hervey, afterwards, to wit, on the 8th day of March, in the ninth year of the reign of our said Sovereign Lord George III., now King of Great Britain, and so forth, with force and arms, at the said parish of Saint George, Hanover Square, feloniously did marry and take to husband the said Evelyn Pierrepont Duke of Kingston, the said Augustus John Hervey, your former husband, being then alive.

How say you? Are you guilty of the felony whereof you stand indicted, or not guilty?

DUCHESS OF KINGSTON—I, Elizabeth Pierrepont, Duchess Dowager of Kingston, indicted by the name of Elizabeth, the wife of Augustus John Hervey, Esquire, say that I am not guilty.

CLERK OF THE CROWN—Culprit, how will you be tried?

DUCHESS OF KINGSTON—By God and my Peers.

CLERK OF THE CROWN—God send Your Grace a good deliverance. Serjeant-at-Arms, make proclamation.

SERJEANT-AT-ARMS—Oyez, oyez, oyez! All manner of persons that will give evidence, on behalf of our Sovereign Lord the King, against Elizabeth Duchess Dowager of Kingston, the prisoner at the bar, let them come forth, and they shall be heard; for now she stands at the bar upon her deliverance.

LORD HIGH STEWARD—My Lords, the distance of this place from the bar is so great that I must desire your Lordships' leave to go down to the table for the convenience of hearing.

The Trial.

LORDS—Ay, ay.

Then His Grace removed to the table.

DUCHESS OF KINGSTON—My Lords, the supposed marriage in the indictment with Mr. Hervey, which is the ground of the charge against me, was insisted upon by him in a suit instituted by me in the Consistory Court of the Right Reverend Lord Bishop of London, by the sentence of which Court, still in force, it was pronounced, decreed, and declared that I was free from all matrimonial contracts or espousals with the said Mr. Hervey; and, my Lords, I am advised that this sentence, which I now desire leave to offer to your Lordships (remaining unreversed and unimpeached), is conclusive, and that no other evidence ought to be received or stated to your Lordships respecting such pretended marriage.

LORD HIGH STEWARD—Do the counsel for the prosecutor object to the reading of the sentence?

THE ATTORNEY-GENERAL—My Lords, observing that the prisoner was about to make some application to your Lordships, I was not solicitous to rise in the order and place wherein I ought to have addressed myself to the House; because I would not interrupt or prevent anything which she might think material for her to lay before your Lordships.

I attended much to the form of the application. If I comprehend the aim of it, the means to object to your Lordships hearing any evidence, either given or stated, in support of the present indictment; the ground of her objection being a sentence, said to have passed in the Ecclesiastical Court, against the first marriage supposed in the indictment. Upon this your Lordships have demanded whether I object to the reading of the sentence? If the proceeding referred to had been tendered to your Lordships in the only place, which can be thought the proper or regular one, for receiving the defendant's evidence, to be sure, many questions would naturally have arisen upon it. First, whether that proceeding, explained as it will be, has the force of a sentence, or amounts to more than a circumstance and proof of the fraud complained of? Secondly, whether a serious sentence of that sort, pronounced between party and party, ought to be admitted in a criminal prosecution, and against the King, who was no party to it, nor could have become so by any means? Thirdly, whether it creates an estoppel, or conclusive evidence against the Crown? Fourthly, whether it does so in this peculiar species of prosecution?

But in the way this thing is urged it seems perfectly impossible, or at least altogether premature, to discuss the force and effect of it as evidence. That supposes a case already made for the prosecutor, which requires the aid of evidence, on the part of the prisoner, to disprove or explain it. But, if I catch the idea per-

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fectly, the present insisting is, that the sentence now offered to the consideration of your Lordships carries some legal force—what, I do not pretend to define or explain; for I protest I have no guess what is meant; but—some legal force with it, which enables the prisoner to demand, in this stage of the business, that the trial shall not proceed, nor any evidence be heard to maintain the indictment; but that the whole matter shall be wound up, and conclude with some resolution of your Lordships—not to acquit (for in order to do that you must try), but to dismiss the prisoner, without trial, after putting herself upon her Peers for trial.

I have, notwithstanding, shortly intimated the nature of the objections, which may be made to it, as an article of evidence for the prisoner, partly to point out how untenable the proposition is of stopping the trial by interposing a thing, whose reality, competence, and effect will be so much disputed in matter of fact and of law; but chiefly to lay in my claim that this paper (if your Lordships should think it worth hearing) may be read at this time, and for the purpose of the motion now made by the prisoner only, without prejudice to any objection which I may think fit to make to it if it should be offered as evidence in the course of the trial.

If it be read under the reserve I have mentioned, not as a part of the trial, but to make this application of the prisoner to your Lordships, previously to her trial, intelligible; and for the sake of raising the argument upon it, in case your Lordships should suffer such a point to be argued at all: in these views, I will not object to the reading of it. But if it be offered as a piece of evidence for the prisoner, so that I must admit or object to it now, I shall certainly insist upon going on with the prosecution, and drive this article of evidence into its own place, the prisoner's defence. There it will be better seen how far it is available or even competent. Unless I could learn the purpose of offering it from those who advised it, I do not know how to make a more particular answer to your Lordships' question.

DUCHESS OF KINGSTON—Will your Lordships please to permit my counsel to be heard to this point?

LORDS—Ay, ay.

LORD HIGH STEWARD—Mr. Wallace, you may proceed for the prisoner.

MR. WALLACE—My Lords, I have the honour to be assigned one of the counsel to advise and assist the noble prisoner at the bar in all matters of law that may arise in the course of the trial. I shall submit with great deference to your Lordships that the present stage of the business is the proper season to introduce the sentence which has been mentioned to the Court.

My Lords, the sentence is conceived to be conclusive upon the fact of that marriage, which is the ground of this indictment. The indictment supposes that the prisoner at the bar was married

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to Augustus John Hervey: the sentence now offered to your Lordships is not only of a competent jurisdiction to decide that question, but the only constitutional jurisdiction. Whilst this sentence remains unimpeached I conceive that it is conclusive against all evidence to be produced of the fact of the marriage. It is in that light the prisoner is advised to offer it to your Lordships, that a Court of competent jurisdiction having decided the point, it will be in vain to call parole witnesses to the fact; and it will only take up your Lordships' time, and it will be of no real use to state the evidence of witnesses, which witnesses cannot appear to give that evidence before the Court.

The office of a counsel in opening the case to any Court is, as I conceive, to state with clearness the evidence that is to be adduced, that the Court may better understand and apply it; therefore, unless the evidence is competent, your Lordships will not hear any state of it. This, too, perhaps, may be the time, though I shall forbear at present to enter into it, to discuss whether the sentence be admissible, or, if admissible, whether conclusive; but we are now, my Lords, upon the order of producing this sentence, and if it has the effect, which I shall humbly submit in a proper season to your Lordships that it has, of being absolutely conclusive, then the evidence, which is now ready to be stated by the counsel for the prosecution, ought not to be produced, and, of course, ought not to be stated. This is the light in which the cause appears to me at this moment; and I trust your Lordships will concur in the opinion, that if the sentence has the conclusive effect, which we are ready to submit to your Lordships it has, it repels all testimony, and makes it improper therefore to state any. If a precedent should be thought necessary for what is prayed by the noble prisoner at the bar, I beg leave to refer your Lordships to a case determined at the bar of the Court of King's Bench in the reign of King William: it is reported in Mr. Serjeant Carthew's Reports, 225, upon a trial of an ejectment. The question was, if Sir Robert Carr was actually married to Isabella Jones, by whom he had issue, and under whom the plaintiff in that cause claimed the estate. The Defendant, by way of anticipation of the evidence which the plaintiff was about to give, moved the Court, that the plaintiff ought not to be allowed to prove a marriage between them, because there was a sentence in the Archers upon a suit of jactitation brought against her, by which it was decreed that there was no marriage between them, but that they were free from all matrimonial contracts and espousals. The sentence was then offered in evidence by the defendant's counsel at the bar to conclude the plaintiff from any proof of the marriage, unless he could show that the same was repealed; and upon a debate the Court were all of opinion that this sentence, whilst unrepealed, was conclusive against all matters precedent; and that the temporal Courts must give credit to it

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until it is reversed, it being a matter of mere spiritual cognisance; and upon this the plaintiff was nonsuited. Your Lordships may perceive that this case is applicable to another part of the business before your Lordships; but I cite it now merely to show the sentence was offered, and received to preclude the examination of witnesses; and surely, if witnesses are not admissible, their testimony ought not to be stated.

THE ATTORNEY-GENERAL—My Lords, I do not even now comprehend the order of proceeding proposed. If there be any thing in the present motion considered as proposing a fit manner of regulating this trial, or as a point of general law; in short, if their proposition be maintainable at all, I do assure your Lordships that I am not anxious, or in any degree desirous, to state a case to this audience which must wound the sensibility of the prisoner. This I would avoid, unless public justice and the necessity of the prosecution should absolutely require it of me. If it be possible, on her part, to make any ground for stopping the prosecution in this manner, I shall be well content to stop here. To me it appears flatly impossible. I stated some general hints to this effect when I spoke last.

The learned counsel, in attempting to make good their proposition of stopping the trial in this stage, have contented themselves with a general averment that the law is with them, and refer to the manner in which evidence was received in the particular case of one ejectionment, where no contradiction or controversy appears to have been raised among the counsel about the nature of the cause depending, the sentence produced, or the parties to both. Here a great deal is to be previously settled on those heads. I did not imagine the learned counsel would have stopped so shortly, but if they thought well of the motion, I expected they would have gone the length of arguing on it, and of endeavouring to demonstrate the possibility of winding up the whole proceeding here, by comparing the nature of the sentence with the whole compass of the prosecution, stated with every degree of imaginable aggravation.

Your Lordships might easily perceive my reason for expecting the argument to take this course. The sentence may be read—indeed it must be read. It is the only ground of the motion. But unless such is demonstrated to be the effect of it, your Lordships can take no order upon it, nor make any use or application of it, without hearing the prosecutor's case. It is not therefore enough to read the sentence. My reason for troubling your Lordships at all was only to observe that the motion concludes against even hearing the prosecutor, and to submit, according to my humble duty, to your Lordships whether that be a point of law fit to hear the prisoner upon by her counsel. If it be, your Lordships will call upon the learned counsel whom you have allowed the prisoner to sustain it fully in argument. Otherwise your Lordships will

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reject it as inadmissible. All prosecutions might be stopped in this manner.

A LORD—Does Mr. Attorney-General object to the reading of the sentence?

THE ATTORNEY-GENERAL—Subject to the reservation of my right to object to it in every shape when it shall be offered in evidence; upon that ground I do not object to it. I am not now admitting this sentence to be adduced in the course of the cause, or as a part of the defence, to which I shall say it is incompetent. But I let it in to ground a motion anterior to the hearing of the cause. In that view, and in that view only, I admit it to be read. Indeed, it seems to be offered as a part of the counsel's speech; and I admit it as containing the whole of the argument yet offered in support of the motion. That your Lordships may understand what is to be made of this sentence when read, they must read, in their order, the original allegation of Elizabeth Chudleigh; the cross-allegation delivered in by Mr. Hervey; her answer; the articles on which the proofs were taken; the depositions; and the sentence; for thus the sentence proceeded.

LORD MANSFIELD—They must give in evidence the whole sentence.

[The sentence only begun to be read.]

THE ATTORNEY-GENERAL—I must trouble your Lordships again. They are now offering to read the sentence only, without reading the allegations of the parties, their articles and proofs. For what reason I very well comprehend. But I apprehend that, if a judgment be read in a Court of law, they must read the declaration, plea, replication, and all other matters leading to the judgment, in order to make it intelligible. Here they would read the sentence abstractedly from the allegations and other matters upon which that sentence proceeded.

LORD CAMDEN—I wish to know of the counsel for the prisoner whether they meant to object to the whole proceedings in the jactitation cause being read.

MR. WALLACE—I have not, upon the part of the noble prisoner, the least objection that all the proceedings should be brought before your Lordships. I conceive that what the officer has now brought before the Court was what is usually given in evidence in such case. I do not recollect any other, in any case I have found, being produced but the sentence, which states in short the proceedings had in that Court; but I understand the proceedings are here, and on the part of the noble prisoner there is not the least objection to the whole being laid before the Court.

The Lords then permitted the following proceedings in the jactitation cause and the sentence pronounced in the Ecclesiastical Court to be read *de bene esse*.

The Duchess of Kingston.

SECOND SESSION. Michaelmas Term, 1768.

Chudleigh v. Hervey.—Libel given the 9th of November, 1768. Bishop.

In the name of God, Amen, before you the Worshipful John Bettesworth, Doctor of Laws, Vicar-General of the Right Reverend Father in God, Richard, by divine permission, Lord Bishop of London, and Official Principal of the Consistorial Episcopal Court of London lawfully constituted, your surrogate, or any other competent Judge in this behalf of the proctor of the Honourable Elizabeth Chudleigh, of the parish of Saint Margaret, Westminster, in the county of Middlesex, spinster; against the Honourable Augustus John Hervey, of the parish of Saint James's, Westminster, in the county of Middlesex and diocese of London, a bachelor; and against any other person or persons lawfully intervening or appearing for him in judgment before you by way of complaint, and hereby complaining unto you in this behalf, doth say, allege, and in law articulately propound as follows; that is to say,

1. That the said Honourable Elizabeth Chudleigh was and is free, and no way engaged in any matrimonial contract or espousals with the said Honourable Augustus John Hervey, and for and as a person free and no way engaged, was and is commonly accounted, reputed, and taken to be amongst her neighbours, friends, and familiar acquaintance; and the party proponent doth allege and propound everything in this article contained jointly and severally,

2. That the said Honourable Augustus John Hervey, sufficiently knowing the premises, and, notwithstanding the same, did in the year of our Lord 1763, 1764, 1765, 1766, and 1767, and in the several months therein concurring, and in the present year of our Lord 1768, within the parish of Saint James, Westminster, aforesaid, and in other parishes and places in the neighbourhood thereof and thereto adjoining, or in all, some, or one of the afore-mentioned times and places, in the presence of several credible witnesses, falsely and maliciously boast, assert, and report that he was married to or contracted in marriage with the aforesaid Honourable Elizabeth Chudleigh, whereas in truth and fact not any such marriage was ever solemnised or ever contracted between them; and this was and is true, public, and notorious; and the party proponent doth allege and propound of any other time or times and places as shall appear from the proofs to be made in this cause, and as before,

3. That the said Honourable Augustus John Hervey hath been oftentimes, or at least once on the part and behalf of the said Honourable Elizabeth Chudleigh, and her friends and acquaintance, asked and requested, or desired to desist and abstain from his aforesaid pretended false and malicious boasting, asserting, and reporting, as mentioned in the next preceding article; and the party proponent doth allege and propound as before,

4. That the said Honourable Augustus John Hervey, being as aforesaid asked and requested to cease, desist, and abstain from his aforesaid pretended false and malicious boasting, asserting, and reporting, hath not in

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the least, nor doth in the least at present, cease, desist, and abstain therefrom, but continually with like malice and rashness does constantly, falsely, and maliciously boast, assert, affirm, and report the same, to the great danger of his soul's health, no small prejudice to the said Honourable Elizabeth Chudleigh, and pernicious example of others; and this was and is true, public, and notorious; and the party proponent doth allege and propound as before,

5. That of all and singular the premises it was and is, by and on the part and behalf of the said Honourable Elizabeth Chudleigh, spinster, thinking herself greatly injured, aggrieved, and disquieted by reason of the aforesaid pretended false and malicious boasting, asserting, and reporting of the said Honourable Augustus John Hervey, rightly and duly complained to you the Judge aforesaid, and to this Court, for a fit and meet remedy to be had and provided in this behalf; and the party proponent doth allege and propound as before,

6. That the said Honourable Augustus John Hervey was and is of the parish of Saint James, Westminster, in the county of Middlesex and diocese of London, and therefore and by reason of the premises was and is subject to the jurisdiction of this Court; and the party proponent doth allege and propound as before,

7. That all and singular the premises were and are true, public, and notorious, and thereof there was and is a public voice, fame, and report, and of which legal proof being made, the party proponent prays right and justice to be effectually done and administered to him and his party in the premises; and also that by this Court it may be pronounced, decreed, and declared that the said Honourable Elizabeth Chudleigh, at and during all the times in this libel mentioned, was a spinster, and free from all matrimonial contracts and espousals with him the said Honourable Augustus John Hervey; and that he, notwithstanding the premises, did, in the years, months, and places in this libel mentioned, or in some or one of them, falsely and maliciously boast, assert, and report that he was married to or contracted in marriage with the said Honourable Elizabeth Chudleigh; and that he may be enjoined perpetual silence in the premises, and obliged and compelled to cease, desist, and abstain from such his aforesaid false and malicious boastings, assertions, and reports for the future; and that he may be condemned in the costs made and to be made in this cause on the part and behalf of the said Honourable Elizabeth Chudleigh, and compelled to the due and effectual payment thereof by you or your definitive sentence or final decree to be given in this cause; and, further, to do and decree in the premises what shall be lawful in this behalf, the party proponent not obliging himself to prove all and singular the premises, or to the burden of a superfluous proof, against which he protests; and prays that so far as he shall prove in the premises, he may obtain in his petition the benefit of the law being always preserved, humbly imploring the aid of your office in this behalf.

ARTH. COLLIER.

PET. CALVERT.

WM. WYNNE.

The Duchess of Kingston.

Hervey v. Hervey, called Chudleigh. Fountain—Bishop.

Which day Fountain, in the name of and as the lawful proctor of the Right Honourable Augustus John Hervey, and as such, and under that denomination, did, by all ways and means which may be most beneficial and effectual for his said party in this behalf, and to all intents and purposes in law whatsoever, say, allege, and in law articulately propound as follows; to wit:

1. That some time in the year 1743, or 1744, the Right Honourable Augustus John Hervey, then the Honourable Augustus John Hervey, Esquire, and son of the Right Honourable John, late Lord, Hervey, became acquainted with Elizabeth Chudleigh, now Hervey, at Winchester Races; and the said Honourable Augustus John Hervey, Esquire, having conceived a liking and affection for the said Elizabeth Chudleigh, and being a bachelor, and a minor of the age of seventeen or eighteen years, and free from any matrimonial contract, did privately make his addresses of love and courtship to the said Elizabeth Chudleigh, who was then also a minor and a spinster of the age of about eighteen years, and also free from any matrimonial contract; and she, the said Elizabeth Chudleigh, now Hervey, did receive and admit such his addresses and courtship, and entertain him as a suitor to her in the way of marriage, but without the privity or knowledge of either of their relations or friends, excepting her aunt, the late Mrs. Hanmer, and they mutually contracted themselves to each other; and the party proponent doth allege and propound of any other time and place, and of everything in this article contained jointly and severally.

2. That in the said year 1744, the said Honourable Augustus John Hervey, Esquire, was a lieutenant in the Navy, and belonged to His Majesty's ship "Cornwall," which in August, 1744, lay at Portsmouth; that the said Elizabeth Chudleigh, in July, 1744, being on a visit at John Merrill's, Esquire, at Lainston, in the parish of Sparshot, in the county of Southampton, with her aunt, Mrs. Hanmer, and the said Augustus John Hervey, being then on board the said ship "Cornwall" at Portsmouth, went from thence to the said Mr. Merrill's in order to see the said Elizabeth Chudleigh; and the said ship, being under sailing orders for and being soon to depart for the West Indies, it was proposed between the said Augustus John Hervey and Mrs. Hanmer that they, the said Augustus John Hervey and Elizabeth Chudleigh, should be married privately at the said Mr. Merrill's house; and accordingly they, the said Augustus John Hervey and Elizabeth Chudleigh, were, on or about the 4th day of August, 1744, in Mr. Merrill's house, in the parish of Sparshot aforesaid, joined together in holy matrimony, about eleven o'clock at night, by the Rev. Thomas Amis, since deceased, a clergyman in Holy Orders, according to the rites and ceremonies of the Church of England, in the presence of Mrs. Hanmer, the aunt of her, the said Elizabeth Chudleigh, and Mr. Mountnay, both since deceased; and were then and there by him, the said Thomas Amis, pronounced for and as lawful husband and wife; and the party proponent doth allege and propound as before,

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3. That after the said Augustus John Hervey and Elizabeth Chudleigh, now Hervey, were so privately married, they consummated such their marriage at the said Mr. Merrill's house, by having the carnal knowledge of each other's bodies, and laying for some time in one and the same bed naked and alone, but without the privity or knowledge of any part of the family and servants of the said Mr. Merrill; and the party proponent doth allege and propound as before,

4. That the said Augustus John Hervey, Esquire, continued at the said Mr. Merrill's about two or three days, and then returned to his said ship "Cornwall," wherein he in November following sailed for the West Indies; and that, on account of certain circumstances of his family, it being necessary that the said marriage should be kept a secret from every person, except those before mentioned, therefore the said Elizabeth Hervey continued to go by the name of Chudleigh when she left the said Mr. Merrill's, residing at different places and passing for a single person; that the said Augustus John Hervey, Esquire, remained in the West Indies till the month of August in the year 1746, when he sailed for England, and landed at Dover on or about the 16th October following; that the said Elizabeth Hervey at that time resided in Conduit Street, where the said Augustus John Hervey, Esquire, went to see her as his wife several times, and she received him and acknowledged him to be her husband, but they did not publicly own their marriage or cohabit together as husband and wife, and this was and is true; and the party proponent doth allege and propound as before,

5. That the said Augustus John Hervey, Esquire, on the 28th day of the month of November in the said year 1746, went to sea again, and returned to England in the January following; that the said Elizabeth Hervey, otherwise Chudleigh, at that time continued in Conduit Street; but some differences arising between them on account of the conduct of the said Elizabeth Hervey, they continued to live separate from each other for the future; and the said Honourable Augustus John Hervey thereupon forbore visiting the said Elizabeth Hervey, and some time in the month of May, 1747, sailed for the Mediterranean sea in the ship called the "Princessa," and continued abroad till the month of December in the following year; that from the time they so continued to live separate as aforesaid to this time the said Augustus John Hervey has never visited the said Elizabeth Hervey, and this was and is true; and the party proponent doth allege and propound as before,

6. That all and singular the premises were and are true, public, and notorious, and therefore there was and is a public voice, fame, and report, of which legal proof being made, the party proponent prays right and justice to be administered to him and his party in the premises, and that it may be pronounced that the said Right Honourable Augustus John Hervey and Elizabeth Chudleigh were and are lawful man and wife.

GEO. HARRIS.

The Duchess of Kingston.

Consistory of London, FOURTH SESSION of Michaelmas Term,
6th December, 1768.

Chudleigh v. Hervey. Bishop—Fountain.

On which day Bishop, in the name of and as lawful proctor of the Honourable Elizabeth Chudleigh, spinster, and as such, and under that denomination, did, by all ways and means which may be most beneficial and effectual in this behalf, and to all intents and purposes in law whatsoever, say, allege, and articulately propound as follows; to wit :

1. That as well before as ever since the pretended time of the pretended marriage pleaded and propounded by the Right Honourable Augustus John Hervey, the other party in this suit, to have been on or about the 4th August, 1744, the said Honourable Elizabeth Chudleigh has always passed as a single woman, and has always gone, been known, and been addressed by the name of Elizabeth Chudleigh, and by no other, and hath always visited and received visits as a single woman, and hath always lived separate and apart from the said Right Honourable Augustus John Hervey, without any interposition, let, or hindrance of the said Right Honourable Augustus John Hervey, and hath not at any time lived or cohabited with him, or he with her; and this was and is true; and so much the said Right Honourable Augustus John Hervey well knows and believes in his conscience to be true; and the party proponent doth allege and propound everything in this article contained jointly and severally,

2. That in the year of our Lord 1743 the said Elizabeth Chudleigh was admitted a Maid of Honour to her Royal Highness the Princess of Wales; and on the death of His Royal Highness the Prince of Wales, on or about the 17th April, 1751, readmitted and continued Maid of Honour to Her Royal Highness the Princess Dowager of Wales, without any let or hindrance of the said Right Honourable Augustus John Hervey, and hath during the whole of the said time continued and now continues a Maid of Honour to Her Royal Highness the Princess Dowager of Wales, without any let or hindrance of the said Right Honourable Augustus John Hervey; and this was and is true; and so much the said Right Honourable Augustus John Hervey knows and believes in his conscience to be true; and the party proponent doth allege and propound as before,

3. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex two certificates, and copies of the entries from the Treasurer's Office of the Princess Dowager of Wales, marked with the letters A and B, of the admission of the said Elizabeth Chudleigh as Maid of Honour, and of her continuance now in such post, and prays that the same may be here read, and taken as if herein inserted; and doth allege that the same contain true copies of the entries of the said Elizabeth Chudleigh as Maid of Honour, and was and is signed by Mr. William Watts, Deputy Treasurer to Her Royal Highness the Princess Dowager of Wales; and that Elizabeth



Augusta, Consort of Frederick, Prince of Wales.

(From the painting by Vanloo.)

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Chudleigh therein named, and Elizabeth Chudleigh, party in this suit, was and is one and the same person, and not divers; and the party proponent doth allege and propound as before,

4. That in the year 1753 the said Elizabeth Chudleigh, in her own name as a spinster, and without any interposition, let, or hindrance of the said Right Honourable Augustus John Hervey, or his being a party thereto or any ways concerned therein, took a lease of the Right Honourable Lord Berkeley of Stratton of certain land in Hill Street, in the parish of George, Hanover Square, in the county of Middlesex, whereon the said Elizabeth Chudleigh caused to be built a house, wherein she continued to live for the space of five years and upwards, and afterwards sold the same to Hugo Meynell, Esquire, and received the money proceeding from the sale thereof to her own use; and this was and is true; and the party proponent doth allege and propound as before,

5. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex the original lease of the land aforementioned, dated the 14th April, 1753, executed by the said Lord Berkeley and John Philips, who was interested therein, and thereby leased to the said Elizabeth Chudleigh, spinster, her executors, administrators, and assigns, for the term of eighty-seven years, and marked with the letter C, and prays that the same may be here read, and taken as if herein inserted; and doth allege that everything was so had and done as is therein contained, and that Elizabeth Chudleigh, spinster, therein mentioned, and Elizabeth Chudleigh, spinster, party in this cause, was and is one and the same person, and not divers; and this was and is true; and the party proponent doth allege and propound as before,

6. That on the 3rd day of February, in the year of our Lord 1757, the said Elizabeth Chudleigh, spinster, was admitted a copyholder and tenant to the Dean and Chapter of Westminster for the house and land, or some part thereof, wherein she now lives at Knightsbridge, in the county of Middlesex, in her own then and now maiden name of Elizabeth Chudleigh, and without any interposition, let, or hindrance of the said Right Honourable Augustus John Hervey, or without his being a party thereto or any ways concerned therein; and this was and is true; and the party proponent doth allege and propound as before,

7. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a copy of the Court roll of the said Elizabeth Chudleigh's being admitted tenant to the premises mentioned in the next preceding article, and marked with the letter D; and that Elizabeth Chudleigh therein mentioned, and Elizabeth Chudleigh, party in this cause, was and is one and the same person, and not divers; and the party proponent doth allege and propound as before,

8. That in the year of our Lord 1762 the said Elizabeth Chudleigh, spinster, transacted business with John Butcher in her own maiden name

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of Chudleigh, and took a lease from the said Mr. Butcher of certain lands situate in the parish of Kensington, in the county of Middlesex, and this without any interposition, let, or hindrance of the said Right Honourable Augustus John Hervey, or his being a party thereto or any ways concerned therein; and in such lease the said Elizabeth Chudleigh was described by the name of Elizabeth Chudleigh; and this was and is true; and the party proponent doth allege and propound as before,

9. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if therein inserted, the said lease mentioned in the preceding article, and marked with the letter E; and doth allege that everything was so had and done as therein is contained; and that Elizabeth Chudleigh therein named, and Elizabeth Chudleigh, spinster, party in this cause, was and is one and the same person, and not divers; and this was and is true; and the party proponent doth allege and propound as before,

10. That Mrs. Ann Hanmer, the aunt of the said Elizabeth Chudleigh, spinster, the party proponent, and who, in the second article of the pretended allegation, admitted on the part of the said Right Honourable Augustus John Hervey, is pretended to have been present at the pretended marriage pleaded by the said Augustus John Hervey, did, in the year 1762, write a letter with her own hand to the said Elizabeth Chudleigh, spinster, wherein she addresses her as a single woman, therein calling her dear Mrs. Chudleigh; and also in or about the year following did make her last will and testament and codicil, the codicil not dated, but the will bearing date the 11th day of June, 1763, and both will and codicil, as well as the letter aforesaid, are of the handwriting of the said Mrs. Ann Hanmer, and so known to be by persons who have seen her write and subscribe her name to writings, and are well acquainted with her manner and character of handwriting; and in which will and codicil, proved in the Prerogative Court of Canterbury, and now remaining in the registry thereof, the said Mrs. Hanmer hath by the will given a silver sugar urn and spoon, and by her codicil hath given and bequeathed a legacy of £100 to the said Elizabeth Chudleigh, by the name and description of the Honourable Mrs. Elizabeth Chudleigh; and this was and is true; and the party proponent doth allege and propound as before,

11. That in supply of proof of the premises mentioned in the next preceding article, the party propounding doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the said letter marked with the letter F, beginning thus—"Sunning-Hill, 14th August, 1862. Dear Mrs. Chudleigh," and ending, "I am, dear madam, your sincere wellwisher and humble servant, A. Hanmer." And doth exhibit a copy of the said will and codicil of the said Mrs. Hanmer, marked with letter G; and doth allege that Mrs. Hanmer, the aunt of the party proponent, who wrote the said letter to the said Mrs. Chudleigh, and who made the said will and codicil, and Mrs. Hanmer, whom the said Right Honourable Augustus John Hervey pretends to have been

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a witness to his pretended marriage, was and is one and the same person, and not divers; and that Mrs. Chudleigh mentioned in the said letter, and the Honourable Mrs. Elizabeth Chudleigh mentioned in the said last will and codicil, and Elizabeth Chudleigh, spinster, party in this cause, was and is the same person, and not divers; and this was and is true; and the party proponent doth allege and propound as before.

12. That Mr. Merrill, at whose house the said Right Honourable Augustus John Hervey hath pleaded the said pretended marriage to have been solemnised, wrote two letters with his own hand, and sent them by the post to the said Elizabeth Chudleigh, party in this cause, wherein he addresses her as a single woman, the said letters being dated 1st November, 1765, and 3rd November, 1765, written in one sheet of paper, and superscribed or directed thus—"To the Honourable Mrs. Elizabeth Chudleigh at Chalmington, near Dorchester, Dorset"; and in the letter of the 3rd November, 1765, are these words, to wit, "I have added your christian name to your surname in the direction of this, lest the word honourable should not be sufficient to prevent a blunder, and the letter should be given to Mrs. Chudleigh. I have met with so many and such gross blunders, that I think I can never enough guard against them." And the party proponent doth allege that by these words, "should be given to Mrs. Chudleigh," was meant Mrs. Chudleigh at Calmington, aunt to the said Elizabeth Chudleigh, the party proponent, at whose house she then was; and this was and is true; and the party proponent doth allege and propound as before,

13. That in supply of proof of the premises in the next preceding article mentioned, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the said two letters mentioned in the next preceding article, the first marked with the letter H, beginning thus, "Lainstone, 1st November, 1765. Dear Madam,—Though I have nothing particular to write to you upon," and ending thus, "Though had I mentioned it to them, Mrs. Kelly's and Mrs. Elstob's would not have been wanting. I am, dear madam, your most obedient humble servant, John Merrill"; and the other letter, marked with the letter I, beginning thus, "3rd November, 1765. Dear Madam,—The above, as you see, was intended to go by the last post," and ending thus, "that I think I can never enough guard against them. I am, dear madam, your most obedient humble servant, John Merrill." And the party proponent doth allege and propound that the whole body, subscriptions, and superscription of the said letters were and are of the proper handwriting and subscription of the said John Merrill, and so known and believed to be by persons who are well acquainted with his manner and character of handwriting and subscription; and that by the words, "I have added your christian name to your surname in the direction of this," was meant and intended the christian and surname of Elizabeth Chudleigh, the party in this suit; and that the Honourable Mrs. Elizabeth Chudleigh mentioned in the said superscription, and the Honourable Elizabeth Chudleigh, party in this suit, was and is one and

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the same person, and not divers; and this was and is true; and the party proponent doth allege and propound as before,

14. That the said Mr. Merrill hath also in and by his last will and testament, bearing date the 1st day of January, 1767, proved in the Pre-rogative Court of Canterbury, and now remaining in the registry thereof, given and bequeathed a legacy or legacies to the said Elizabeth Chudleigh, spinster, party in this suit, by her then and now maiden name of Elizabeth Chudleigh; and this was and is true; and the party proponent doth allege and propound as before,

15. That in supply of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a copy of a clause of the will of the said Mr. Merrill, marked with the letter K; and doth allege that Mr. Merrill, at whose house the pretended marriage pleaded by the said Right Honourable Augustus John Hervey is said to have been solemnised, and Mr. Merrill who made the said will, was and is one and the same person, and not divers; and that the Honourable Elizabeth Chudleigh mentioned in the said will, and the Honourable Elizabeth Chudleigh, spinster, party in this suit, was and is also one and the same person, and not divers; and this was and is true; and the party proponent doth allege and propound as before,

16. That in the year of our Lord 1766, the said Elizabeth Chudleigh borrowed of Mr. John Drummond, a banker, at divers times, on mortgage and bond security, in her own name, and without any interposition, let, or hindrance of the said Right Honourable Augustus John Hervey, or his being a party thereto, or his being any ways concerned therein, the sum of £5160, and gave the said Mr. Drummond a bond for £1000, part thereof, in her then and now maiden name of Elizabeth Chudleigh, and also mortgaged certain premises situate in the manor of Knightsbridge, in the county of Middlesex, in her said then and now maiden name of Elizabeth Chudleigh, unto the said Mr. Drummond, for the repayment of the sum of £4160 to the said Mr. Drummond, as will appear by the original bond and mortgage deed now in the custody or power of the said Mr. Drummond, to which she refers; and the party proponent doth allege that Elizabeth Chudleigh mentioned in the said bond and mortgage deed, and Elizabeth Chudleigh, spinster, party in this suit, was and is one and the same person, and not divers; and this was and is true; and the party proponent doth allege and propound as before,

17. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the counterpart of the said mortgage deed, dated the 18th April, 1766, marked with the letter L; and doth allege and propound that the same was and is the counterpart of the said mortgage deed remaining in the custody or power of the said Mr. Drummond, as mentioned in the next preceding article; and that Elizabeth Chudleigh mentioned in the said bond and mortgage deed, and Elizabeth Chudleigh, spinster, party in this suit, was and is

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the same person, and not divers; and this was and is true; and the party proponent doth allege and propound as before,

18. That in the month of February in the year of our Lord 1765, and in the month of June, 1768, the said Elizabeth Chudleigh, spinster, borrowed of Mr. William Field, of the Inner Temple, attorney-at-law, several sums of money, to the amount of the sum of £1900 or thereabouts, for which she gave to the said Mr Field as security two bonds in her own name of Elizabeth Chudleigh, without the interposition, let, or hindrance of the said Augustus John Hervey, or without his being party thereto, or any ways concerned therein; and this was and is true; and the party proponent doth allege and propound as before,

19. That on or about the 25th February, 1756, administration of the goods, chattels, and credits of Harriot Chudleigh, late of Windsor Castle, in the county of Berks, widow, deceased, the mother of the said Elizabeth Chudleigh, party in this suit, was granted to the said William Field, as the attorney and for the use and benefit of Elizabeth Chudleigh, described in the said administration and in the records of the Prerogative Court of Canterbury by the name and description of Elizabeth Chudleigh, spinster, the natural and lawful daughter and only child of the said Harriot Chudleigh, deceased, without the interposition, let, or hindrance of the said Right Honourable Augustus John Hervey, or without his being party thereto, or any ways concerned therein; and this was and is true; and the party proponent doth allege and propound as before,

20. That in supply of proof of the premises in the next preceding article mentioned, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a copy of the administration act entered on record in the said Prerogative Court of Canterbury, and signed by the deputy-registrars of the said Court, or one of them, marked with the letter M; and doth allege that Elizabeth Chudleigh, spinster, therein mentioned, and Elizabeth Chudleigh, spinster, party in this cause, was and is one and the same person; and this was and is true; and the party proponent doth allege and propound as before,

21. That the said Mr. William Field, as the attorney of the said Elizabeth Chudleigh, and by virtue of a letter of attorney from her for that purpose, given in her name of Elizabeth Chudleigh to him, used to receive her salary as Maid of Honour, without any interposition, let, or hindrance of the said Right Honourable Augustus John Hervey; and this was and is true; and the party proponent doth allege and propound as before,

22. That on or about the 5th day of May, 1766, the said Elizabeth Chudleigh, party in this suit, presented in her own name of Elizabeth Chudleigh, by virtue of a presentation signed by her for that purpose, the Rev. Mr. John Julian, junior, to the living of Hartford, in the county of Devon, who was in virtue of the said presentation duly instituted and inducted to the said living, without any interposition, let or hindrance of the said Right Honourable Augustus John Hervey, or his being a party thereto, or any ways concerned therein; and that this was and is true; and the party proponent doth allege and propound as before,

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23. That in supply of the proof of the premises mentioned in the said next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, an authentic copy of the said presentation marked with the letter N, signed by _____ and also a certificate of the institution of the said Rev. John Julian to the said rectory of Hartford, signed by Richard Burn, notary public, secretary to the Lord Bishop of Exeter, and marked with the letter O; and doth allege that Elizabeth Chudleigh mentioned in the said presentation and certificate, and Elizabeth Chudleigh, party in this cause, was and is one and the same person, and not divers; and this was and is true; and the party proponent doth allege and propound as before,

24. That the said Elizabeth Chudleigh, for many years subsequent to the pretended time of the pretended marriage aforesaid, kept a current account of cash with the Bank of England in her name of Elizabeth Chudleigh, and as a single woman; and also in all common as well as other occurrences of buyings and sellings, and other money matters, whenever occasion happened, the said Elizabeth Chudleigh, spinster, party in this suit, hath, as well before as ever since the pretended time of the pretended marriage, pleaded by the said Right Honourable Augustus John Hervey, constantly in her own name of Elizabeth Chudleigh, spinster, transacted such business, by paying and receiving money, giving and taking receipts for the same, hiring and discharging servants, and on all other occasions, without the interposition, let, or hindrance of the said Right Honourable Augustus John Hervey, or his being any ways concerned therein; and this was and is true; and the party proponent doth allege and propound as before,

25. That all and singular the premises were and are true, and so forth.

ARTH. COLLIER.

PET. CALVERT.

WM. WYNNE.

Chudleigh v. Hervey.—Sentence read and promulged the 10th of February, 1769.

In the name of God, Amen.—We, John Bettesworth, Doctor of Laws, Vicar-General of the Right Reverend Father in God, Richard, by divine permission Lord Bishop of London, and Official Principal of the Consistorial and Episcopal Court of London, having seen, heard, and understood, and fully and maturely discussed the merits and circumstances of a certain cause of jactitation of marriage which was lately controverted, and as yet remains undetermined before us in judgment, between the Honourable Elizabeth Chudleigh, of the parish of Saint Margaret, Westminster, in the county of Middlesex, spinster, the party, agent, and complainant, of the one part, and the Right Honourable Augustus John Hervey, of the parish of Saint James, Westminster, in the county of Middlesex and diocese of London, bachelor, falsely calling himself the husband of the said Honourable Elizabeth Chudleigh, the party accused and complained of, on the other part; and we rightly and duly proceeding therein, and the parties

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aforesaid lawfully appearing before us by their proctors respectively, and the proctor of the said Honourable Elizabeth Chudleigh praying sentence to be given and justice to be done to his party, and the proctor of the said Right Honourable Augustus John Hervey also earnestly praying sentence and justice to be done to his said party, and we having carefully looked into and duly considered of the whole proceedings had and done before us in the said cause, and observed by law what ought to be observed in this behalf, have thought fit, and do thus think fit, to proceed to the giving and promulging our definitive sentence or final decree in this same cause in manner and form following, to wit :

Forasmuch as by the acts enacted, alleged, exhibited, propounded, proved, and confessed in this cause, we have found and clearly discovered that the proctor of the said Honourable Elizabeth Chudleigh hath fully and sufficiently founded and proved his intention deduced in a certain libel and allegation and other pleadings and exhibits given in, exhibited, and admitted on her behalf in this same cause, and now remaining in the registry of this Court (which libel and allegation and other pleadings and exhibits we take and will have taken as if herein repeated and inserted for us to pronounce as herein after we shall pronounce); and that nothing, at least effectual in law, hath on the part and behalf of the said Right Honourable Augustus John Hervey been excepted, deduced, exhibited, propounded, proved, or confessed in this same cause, which may or ought in any wise to defeat, prejudice, or weaken the intention of the said Honourable Elizabeth Chudleigh deduced as aforesaid; and particularly that the said Right Honourable Augustus John Hervey hath totally failed in the proof of his allegation given in and admitted in this cause, whereby he pleaded and propounded a pretended marriage to have been solemnised between him and the said Honourable Elizabeth Chudleigh, spinster; and therefore we, John Bettsworth, Doctor of Laws, the Judge aforesaid, first calling upon God and setting Him alone before our eyes, and having heard counsel in this cause, do pronounce, decree, and declare that the said Honourable Elizabeth Chudleigh, at and during all the time mentioned in the said libel given in and admitted in this cause, and now remaining in the registry of this Court was and now is a spinster, and free from all matrimonial contracts or espousals (as far as to us yet appears), more especially with the said Right Honourable Augustus John Hervey; and that the said Right Honourable Augustus John Hervey, notwithstanding the premises, did in the years and months libellate wickedly and maliciously boast and publicly assert (though falsely) that he was contracted in marriage to the said Honourable Elizabeth Chudleigh, or that they were joined or contracted together in matrimony; wherefore we do pronounce, decree, and declare that perpetual silence must and ought to be imposed and enjoined the said Right Honourable Augustus John Hervey as to the premises libellate, which we do impose and enjoin him by these presents; and we do decree the said Right Honourable Augustus John Hervey to be admonished to desist from his boasting and asserting that he was contracted to or joined with the said Honourable Elizabeth Chudleigh in matri-

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mony as aforesaid; and we do also pronounce, decree, and declare that the said Right Honourable Augustus John Hervey ought by law to be condemned in lawful expenses made or to be made in this cause on the part and behalf of the said Honourable Elizabeth Chudleigh, to be paid to the said Elizabeth Chudleigh or her proctor; and accordingly we do condemn him in such expenses, which we tax at and moderate to the sum of £100 of lawful money of Great Britain, besides the expense of a monition for payment on this behalf by this our definitive sentence or final decree, which we read and promulge by these presents.

J. BETTESWORTH.

ARTH. COLLIER.

PET. CALVERT.

WM. WYNNE.

This sentence was read, promulged, and given by the within-named the Vicar-General and Official Principal on Friday, the 10th day of February, in the year of our Lord 1769, in the Dining-room adjoining to the Common hall of Doctors' Commons, situate within the parish of Saint Benedict, near Paul's Wharf, London, there being then and there present the witnesses specified in the Acts of Court, which I attest.

MARK HOLMAN, Notary Public,
Deputy Register.

Mr. WALLACE—Your Lordships are now possessed of a sentence given by the Consistory Court of the Bishop of London in a cause instituted there to try a claim made by Mr. Hervey of marriage with the noble prisoner; your Lordships find by that sentence the claim examined, and the decree pronounced upon the allegations and the evidence given in the cause, by which decree the noble prisoner at the Bar is declared free from all matrimonial contracts and espousals with Mr. Hervey. The noble prisoner by the indictment is charged subsequently to this supposed marriage to Mr. Hervey, to have married the late Duke of Kingston. It is for me now to submit to your Lordships that this sentence is conclusive as long as it remains in force, and that of necessity it must be received in evidence in all Courts and in all places where the subject of that marriage can become a matter of dispute.

I don't know any Court which the constitution of this kingdom has placed the decisions of the rights of marriage in but the Ecclesiastical; I believe it will not be contended that the common law Courts of this country have any such original jurisdiction. Marriages may indeed incidentally come to be discussed and determined in the Courts of common law, and in many cases absolutely necessary to the due administration of justice; but, my Lords, it will not be found that where the proper forum has given a decision upon the point, the common law Courts have ever taken upon them-

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selves to examine into the grounds, or at all question the validity of that sentence.

As far as we have books to resort to, we find instances from the earlier times down to the present, where the power of the Ecclesiastical Courts is in terms recognised by the common law Courts, and where their decisions have been considered as conclusive upon every question in which they have jurisdiction, and especially in cases like the present, particularly belonging to them. I don't know in the common law Courts any instance where the legality of marriage can come directly in question that the Courts have decided upon it without referring to the Bishop, the Ordinary of the place, to certify, unless the marriage has been decided by a suit instituted in the Ecclesiastical Courts.

Your Lordships will permit me to refer your Lordships to those authorities of law which are to be found in our books; and by the able assistance which your Lordships' indulgence has given the prisoner at the bar you will more particularly have explained the nature of the proceedings in the Ecclesiastical Courts, how far and to what purposes in those Courts they are conclusive, and where they are open to such litigation. I shall beg to refer your Lordships to a case reported by Lord Chief Justice Coke in the Fourth Part of his Reports, by the name of *Bunting v. Addingshall*. In the 27th year of the reign of Elizabeth, there was a marriage between one Thomas Tweede and one Agnes Addingshall, and subsequent to this marriage a person of the name of Bunting libelled against the wife of Tweede, claiming under a pre-contract, and the spiritual Court enforced that contract; afterwards, on the death of Bunting, a question arose between the issue of the second marriage and the collateral relations of Bunting, the collateral relations insisting that the second marriage was utterly void, because there had existed a first marriage, and the husband living at the time of the second. Another objection I shall state to your Lordships was, that though it might be conclusive between the parties, yet Tweede, the first husband, being no party to the suit, nor to the sentence which dissolved the marriage between them in the Ecclesiastical Court, it could not affect him, nor indeed anybody but the parties. The resolution of the Court was, that he being then *de facto* the husband, though he was not a party to the suit nor in the Ecclesiastical Court, yet the sentence against the wife should bind the husband *de facto*; and "forasmuch as the cognisance of the right of marriage belongs to the Ecclesiastical Court, and the same Court has given sentence in this case, the Judges of our law ought (although it be against the reason of our law) to give faith and credit to their proceedings and sentences, and to think that their proceedings are consonant to the law of Holy Church, for *cuiuslibet in suo arte perito credendum est*, and so the issue of the first marriage in consequence and upon the credit

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of the sentence were considered as legitimate." My Lord Chief Justice Coke has also reported another case upon the subject of marriage in the 40th year of Queen Elizabeth, which your Lordships will find in the Seventh Part of his Reports, page 41, by the name of *Kenn's* case, which is shortly this:—Christopher Kenn, Esquire, married Elizabeth Stowell, and had issue; afterwards the Ecclesiastical Court pronounced a sentence of divorce between Mr. Kenn and the lady, who were not of the age of consent at the time of the marriage, and in consequence of this sentence he married a second wife. The issue of the first marriage, claiming the inheritance, exhibited a bill in the Court of Wards of that day in order to have the benefit of the succession, and offered to prove that though the sentence had been given in the Ecclesiastical Court on the ground of his father and mother being within the age of consent, yet that they were above the age of consent; that in truth they had cohabited together for eight or nine years, and had issue of that marriage; there could be no doubt, if the matter was open to examination, that the first marriage was effectual; for, in the first place, the parties were above the age of consent, and if they had been under the age of consent, yet their cohabitation together after that age, and more especially as they had issue, would have been sufficient to establish the marriage. It was argued, too, that it was open to examination, because both the statute and common law of the country take notice of the age of consent, and therefore it was equally competent to a Court of common law to examination into the question. As to an Ecclesiastical Court, it was further urged that the question related to an inheritance of which the Ecclesiastical Court had no jurisdiction or control, and therefore it was a question properly before a Court of common law. But the Court then conceived themselves so far bound by the decision of the Ecclesiastical Court, though founded on false suggestion, that they held the plaintiff in that cause not entitled to any relief.

My Lords, I beg leave to trouble your Lordships with the words of the Court upon that subject. After stating the reasons, the book proceeds:

But it was resolved by all the Justices (for it was a reference to the two Chief Justices, to two other Justices, to the Chief Baron, and two other Barons) "that the sentence should conclude as long as it remained in force"; and, my Lords, the reasons given are "that the Ecclesiastical Judge has sentenced the contract and marriage to be void and of no effect; and although they were of the age of consent, yet if the original contract was void and of no effect, then there was just cause of divorce; and if the marriage had been within the age of consent, the Ecclesiastical Judge is Judge as well of the assent as of the first contract, and what shall be a sufficient assent or not; and although the Ecclesiastical Judge

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shows the cause of his sentence, yet forasmuch as he is Judge of the original matter, that is, of the lawfulness of the marriage, we will never examine the cause, whether it be true or false; for of things the cognisance whereof belongs to the Ecclesiastical Court, we ought to give credit to their sentences, as they give to the judgments in our Courts."

Your Lordships find here a case where, according to the facts stated, there was no doubt of the validity of the first marriage, and of the legitimacy of the issue claiming in that cause; and, if there had been no sentence of the Ecclesiastical Court, no doubt could have existed of the right of succession. But the sentence in the Ecclesiastical Court having interposed, the Court of common law conceived themselves absolutely bound, nay, that they had no right to look into the cause of that sentence, for it was a matter originally of ecclesiastical jurisdiction, and they must give faith and credit to the sentence of the Ecclesiastical Judge in that cause. Your Lordships will find that my Lord Chief Justice Coke cited a case so long ago as 22 Edward IV., where the same doctrine was laid down in the Ecclesiastical Court having a complete and decisive jurisdiction upon this point.

These cases from the reporter and from the Judges who determined them, the reporter being one, I take to be of the highest authority, and acknowledging those principles which occur frequently in the books, though not under solemn decisions, but as the received opinions of Judges and of lawyers from the earliest of times.

I did before mention to your Lordships a case from Carthew; I shall not state it particularly now, but only to the point which we are now upon, that is, of the sentence being conclusive. This was not, as supposed in the argument, a *nisi prius* opinion, which every Judge must give with the information he carries with him, and without the assistance of the rest of the Judges of the Court, but a solemn decision in trial at bar in the Court of King's Bench in 4 King William, when I think Lord Chief Justice Holt presided in that Court; it was, too, upon a sentence of jactitation of marriage, which your Lordships have now before you, which was there held to be conclusive evidence, and that no testimony whatever ought to be received against it. Your Lordships will take the words of the Court upon that occasion: "Upon the debate the Court were all of opinion that this sentence whilst unrepealed was conclusive against all matters precedent; and that the temporal Courts must give credit to it until it is reversed, being a matter of mere spiritual cognisance."

Your Lordships find that in the reign of King William that notion which had from all time prevailed was as strong as ever, and that the Judges of the Court of King's Bench, in which it was tried, were all clearly of opinion that a case like the present

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of jactitation of marriage was conclusive upon the point till it was reversed or repealed. The same doctrine is laid down by my Lord Chief Justice Holt, who presided at the trial of this cause, in a case reported in Salkeld, 290, by the name of *Blackham's* case. It turns upon the claim of property in the goods of a woman deceased; the plaintiff proved the goods to be in his possession, and to be taken away by the defendant; against this claim of the plaintiff the defendant showed that there were the goods of one Jane Blackham in her lifetime, and that the defendant had taken out letters of administration to her, and so was entitled to the goods; upon this the plaintiff proved that some few days before her death she was actually married to him; and in answer to that it was insisted that the spiritual Court had determined the right to be in the defendant, for they could not have granted administration to the defendant but upon a supposition that there was no such marriage, and that this sentence being a matter within their jurisdiction was conclusive, and could not be gainsaid as in evidence. My Lord Chief Justice Holt, who was the Judge sitting at *nisi prius*, who determined the case I last cited, says thus: "A matter which has been directly determined by their sentence cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but then it must be in point directly tried."

The sentence before your Lordships at present is in a cause, where the object of the prosecution was to question the claim of marriage, and where the marriage is the point directly tried and determined; so that according to Lord Holt's opinion, if the sentence be directly upon the question, it is so conclusive that it is not competent for any Court of common law to examine into the matter or receive any evidence to contradict it.

These are cases as far as have happened in the Courts of law. I shall now trouble your Lordships with a case determined in the House of Lords under the name of *Hatfield v. Hatfield*. It came on before the House of Lords in the year 1725. The case, as collected from the printed cases of the times, is thus—One Leonard Hatfield married Jane Porter, who had a different name, I see, assigned her, and by his will made a provision for her as his wife. In March, 1720, she filed a bill in the Court of Exchequer in Ireland, where the subject of her provision lay, against Leonard Hatfield, a son by a former wife, and against a trustee, to have the benefit of the provision. In January following the defendant, the son and heir of her husband, having discovered that she had been before married to one Porter, which Porter was then living, he procured a release of part of the provision from Porter, and filed a cross bill for a discovery of the marriage and to stay the proceedings upon her bill. In this cross bill he questioned her upon her marriage to Porter; she denied that she had ever gone

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by the name of Porter, but with respect to a marriage with Porter she pleaded that she ought not to make a discovery, because it tended to criminate herself; and, being an accusation of bigamy against her, the plea by the rules of the Court of Equity was, of course, allowed, that Court never compelling persons to discover on oath crimes which may be the subject of prosecution against themselves. However, by the plea one pretty plainly discovers that there was reason to suppose she was the wife; indeed, she knew it—it was capable of proof, and would be proved in the cause. They proceeded to the examination of the witnesses, and clear evidence was given that this woman was the wife of Porter—Porter himself had confessed it in his answer, and he had stated the minister and the witnesses who were present at the marriage, so that he gave Hatfield, the heir-at-law, an opportunity of bringing direct proof of the marriage from the very persons present. This woman, finding that she would be pressed by that proof, had recourse to the Ecclesiastical Court. She instituted a suit against this Porter of jactitation of marriage, pending the cause; and after depositions taken, though not published, she got Porter over to her interest; he was willing to defeat that release which he had given, and therefore he does not enter into proof, but appears by a proctor for form sake, that a judgment might pass against him. Upon this the Ecclesiastical Judge decreed, as in all causes of jactitation they do where they find that there is no marriage, that the party libelling was free from all matrimonial contracts and espousals with Porter. In this case Porter had given a release as her husband, had upon oath in the Court of Exchequer in Ireland stated the marriage with precision, even named the minister and the witnesses at the marriage, yet in the Ecclesiastical Court he appears by a proctor, and has sentence passed against him, without insisting on the marriage or any defence. The Court of Exchequer in Ireland received this sentence as conclusive against the marriage with Porter; they conceived they were bound to give credit to the Ecclesiastical Court. The plaintiff in the cause, knowing in what manner he had been deceived, that in truth Porter was the husband of this woman, appealed to the House of Lords in England; the House of Lords here conceived, as the Court of Exchequer had done, that the matter was determined by a competent jurisdiction; and yet your Lordships see there was fraud upon the face of the proceedings, if it had been competent to the Court to have entered into that consideration; but the House of Lords here conceived the matter at an end whilst the sentence remained in force, and the decree of the Court of Exchequer was affirmed. Upon the pleading this sentence, the Court of Exchequer in the first instance, the House of Lords in the last, proceeded to determine the matter. It is so taken notice of by Sir John Strange in a case I shall presently mention. It is taken notice of

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by a very laborious compiler of the law, Mr. Viner. Under his title of marriage he mentions the ground of the determination thus—The legality of marriage shall never be agitated in equity, especially after sentence in the spiritual Court in a cause of jactitation of marriage, although the proceedings in the spiritual Court were only faint and collusive. I take this to be a case of the greatest authority, a decision of the House of Peers in this country, and upon a point of jactitation of marriage, a sentence of the same nature with the present before your Lordships.

I shall beg leave to trouble your Lordships with a case or two more upon the subject, which are of more modern times. One is reported by Sir John Strange in the second part of his Reports, 960, under the name of *Clews v. Bathurst*. The action was for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery. The plaintiff proved the marriage by the parson and a woman, and also a consummation; to encounter which the defendant produced a sentence of the Consistory Court of London in a cause of jactitation of marriage brought by the woman against the plaintiff, wherein she was declared free from all contract, and perpetual silence imposed upon the plaintiff; which sentence was pronounced since the issue had been joined in the cause; and the Chief Justice ruled this to be conclusive evidence till reversed by appeal, and the plaintiff was non-suited. Your Lordships find here was a cause rightly brought, clear proof of the marriage made at the trial by the witnesses present, no doubt of the fact, but the production of a sentence in the Ecclesiastical Court in disaffirmance of that marriage; a sentence of jactitation. The Chief Justice who tried the cause considered the business as concluded; that it was of no consequence when the decision was made; if the moment before the trial, it was enough, being by a Court having the proper and the sole jurisdiction of the matter, and whose opinion must be decisive; and therefore though the cause had been brought before any suit instituted in the Ecclesiastical Court, though there was no doubt of the foundation for that cause, yet the sentence is permitted to have effect, and to non-suit that plaintiff who had been injured in the manner the case states.

There was, too, at the same sittings, another case which is reported in the following page by Sir John Strange, of *Da Costa v. Villa Real*, which was an action upon a contract of marriage, per *verba de futuro*, brought by the gentleman against the lady, who pleaded the usual plea *non assumpsit*. When the plaintiff had opened his case the defendant offered in evidence a sentence of the spiritual Court in a cause of contract, where the Judge had pronounced against the suit for a solemnisation in the face of the Church, and declared Mrs. Villa Real free from all contract; and the Chief Justice held this to be proper and conclusive evidence;

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that it was a cause within their jurisdiction; that the nature of the contract was properly examinable by them; and, therefore, as a point determined, he non-suited the plaintiff in that cause, though the plaintiff there opened, and was ready to have proved, the fact of the marriage before the Court; but the sentence having interposed, the Court conceived they were to pay that credit which every Court before had done in Westminster Hall, which all Judges in every age had done to the ecclesiastical jurisdiction in cases within their jurisdiction; and, finding himself concluded by that, defeated the plaintiff of the effect of this suit. My Lords, it was in this case that the case of *Hatfield v. Hatfield* was quoted as an authority.

These are cases upon the very points of marriage, and many of them your Lordships find upon the effect and force and conclusion of a sentence similar to that now under consideration, that of a jactitation cause. My Lords, this has been more recently and within our own memory understood to be law, recognised to the law, and decided accordingly; it is not long ago since an action was brought against the Honourable Mr. Thomas Hervey by a tradesman to recover a debt for necessaries found for his wife. On that trial the marriage was proved to the satisfaction of the jury, and the defendant found liable to pay for those necessaries. Mr. Hervey instituted a suit in the Consistory Court of the Bishop of London of jactitation, and he was declared free from all espousals and contracts of marriage with the lady. During the continuance of this sentence, though appealed from, another creditor brought an action against Mr. Hervey, and had to produce in evidence the same witnesses who had proved the case of the other creditor before any sentence had been obtained, and had succeeded; but the learned Chief Justice who tried that cause conceived it was not then open to examination; that though, in the first instance, when the cause of the first creditor came to be discussed, there was no sentence in the Ecclesiastical Court, and of necessity the Court of common law must decide upon the marriage; but there had then intervened a sentence in the Ecclesiastical Court, which, whilst in force, was conclusive; and, of course, dismissed the plaintiff's claim; and the intent of that appeal was to suspend and reverse that sentence; yet while it stood unreversed it was conclusive, the fact of marriage was open to no examination in any Court whatsoever. This is only an affirmance of the principles of the law, and the doctrine found in the determinations of a thousand cases which the books furnish.

It is not peculiar to the case of marriage, it is the same in other instances where the Ecclesiastical Courts have the jurisdiction; it is so in the probate of wills, it is in the granting of letters of administration. If a will is forged, if a will is fraudulently obtained of a personal estate, of which the Ecclesiastical Court

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has the jurisdiction; if that Court has granted a probate, it is not open to a Court of common law, it is not open to a Court of Equity to enter into the fraud made use of in obtaining the will, or to the forgery committed upon a testator. I shall refer your Lordships to a case or two upon that head—that of *Noel v. Wells*, in first Levinz's Reports, 235, in 19 King Charles II. It was an action brought by the executrix of the husband, and upon the trial the plaintiff produced the probate of the will in evidence; the defendant insisted the will was forged, and the Chief Justice before whom it was tried was of opinion he could not give such evidence directly against the seal of the Ordinary in anything within his jurisdiction; upon which a case was made for the opinion of the Court, and a verdict was for the plaintiff; and the Court held that the Chief Justice at the trial had done right in rejecting the evidence of the forgery, that no such evidence ought to be given till the probate was repealed; they might indeed, by proving the seal of the Ordinary forged, have relief; but if the seal of the Ordinary was genuine, then whatever forgery or fraud was committed it was not open to the examination of a common law Court.

The same doctrine is to be found in the case of *Bransby v. Kerrick and Others*, which was determined by the House of Lords. It was stated in that case that one Robert Bransby, the complainant's son, being entitled to the reversion of a freehold and copyhold estate expectant upon the death of the complainant, made his will, by which he gave all his real and personal estate to the defendant Kerrick, and made him his executor, who proved the will in the Ecclesiastical Court in common form; afterwards, in a contest in the Ecclesiastical Court touching the validity of that will, a sentence was given in favour of the will in the year 1716. Bransby, the father, filed a bill in Chancery to set aside the will for fraud and imposition; witnesses were examined, and many acts and circumstances of imposition were proved upon the defendant. The cause came to be heard before Lord Macclesfield (then Chancellor), upon the 14th of November, 1718, when his Lordship, struck with the monstrous fraud and iniquity of the transaction, declared the executor should stand as a trustee for the next-of-kin. Upon appeal the House of Lords reversed the decree, upon the ground that it was not competent to a Court of Equity to examine into fraud and imposition in a will touching personal estate; that the Court of ecclesiastical jurisdiction had decided that point; that it was no longer open to discussion.

The same rules obtain with respect to every Court of competent jurisdiction, whether foreign or domestic; we give credit to the decisions of all foreign Courts in points within their proper jurisdiction, and do not examine into the facts, but are concluded by the sentence. I will only refer your Lordships to a case

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in Sir Thomas Raymond's Reports, 473. In the war between the Dutch and the French in the time of Charles II., a ship was seized by the French as a Dutch ship, and condemned, the ship being in truth English; the purchaser, under the French condemnation, brought the ship into England, where the right owner seized her. Upon this an action was brought by the purchaser under the condemnation; the defendant, the original owner, offered to prove his property, and that the ship was never a Dutch ship, nor was liable to be taken and condemned by the French; but what said the Court? We must give credit to the condemnation of the Court in France, we are forced to give credit to and believe that this ship was in the condition of a Dutch ship, and subject to a condemnation; and upon the ground that, if a Court of competent jurisdiction gives a sentence, all other Courts must be bound by it, the Englishman was precluded from asserting his right. It was the same upon a case of an insurance, which will occur to some of your Lordships, where the ship was warranted Swedish, and condemned in the war between England and France; the parties were concluded from insisting that the ship is any longer Swedish or a neutral, because a Court of competent jurisdiction had decided the matter. The same law holds in respect to the Courts of Admiralty; whether prize or not prize, belongs to the Court of Admiralty, jurisdiction of that Court decides upon the subject; though they have given a wrong decision, though the facts did not warrant it, though the Judge has done it corruptly, yet it is a sentence which the common law Courts must be bound by, wherever it comes in litigation here; and I have known, in point of experience, in an action of trespass brought here for seizing a ship, where it has been before a Court of Admiralty and received a decision, that the Court of common law no longer entertains the cause, for the question of prize or not prize is peculiarly belonging to the Admiralty jurisdiction, and you give faith and credit to that jurisdiction. I might refer your Lordships, too (but the cases are innumerable upon the subject), to that of *Burroughs v. Jemmino*, in Strange, 233, which was upon a bill of exchange, where, by a peculiar local custom within Leghorn, it is competent to the acceptor of a bill, by a judgment of the Court, to have his acceptance annulled if the drawer becomes bankrupt before the bill be payable; there is no such law in this country; yet, giving credit to the sentence of that Court, the Court of Chancery here would not send it to a trial at law, but determined upon the point that the sentence in that Court was decisive upon the subject, it being a matter within their jurisdiction.

In almost every case where judgments or records of other Courts have been the subject of discussion, the sentences of the Ecclesiastical Court have always been cited and argued from as conclusive upon the subject of dispute, and the Courts have

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uniformly adopted those cases as law; but the attempt has ever been to distinguish cases immediately before the Court from those determined by the ecclesiastical jurisdiction. Your Lordships will find much of that in the case of *Philips v. Bury*, in Skinner, 468.

There was a very late case determined in the Court of Common Pleas, and which is now got into print, reported by Mr. Serjeant Wilson, which is *Biddulph v. Ather*. It arose upon a question of claim by the Duke of Norfolk to all wreck within the Cape of Bramber, in Sussex, which was proved by many records; it was a question whether those records were admissible, or, if admissible, were conclusive evidence; the counsel who argued in favour of those records and the conclusion which was to arise from them compared them to the case of ecclesiastical sentences, and would gladly have brought those records within that rule; the Court in that case acknowledged the argument proper with respect to the Ecclesiastical Courts. The Court admitted that the sentence of an Ecclesiastical Court, in a matter whereof they have the sole cognisance, is conclusive evidence, and parole evidence shall never be received. My Lords, there is a manuscript note in being of what the Judges particularly said, and I find it was cited, as one of the instances where the sentence was conclusive, by the learned Chief Justice who then presided in the Court. He says, if there is a sentence in an Ecclesiastical Court declaring a marriage; for instance, if it could be proved by a hundred witnesses that the parties were never within 500 miles of each other, that evidence is not to be received, but the judgment of the Ecclesiastical Court is conclusive upon the point. In many of the cases I have cited to your Lordships the question came directly before the Court, and received a solemn discussion; in some the doctrine has been recognised; in none, nor in any case that I know of, has it ever been doubted. My Lords, though the cases respect civil suits, I trust that no real ground of distinction can be made between criminal and civil proceedings; in civil suits Courts go as far as possible to relieve claims found in equity and justice; in criminal cases the leaning is always to the defendants; and therefore I should conceive such evidence stronger in a criminal prosecution in favour of innocence.

I will take the liberty, however, of reminding your Lordships of two or three cases in criminal law, where the same doctrine has been established, and the acts of the Ecclesiastical Courts deemed conclusive upon the subject, until reversed by appeal. My Lords, in the first volume of Sir John Strange's Reports, 481, your Lordships will find a case that happened at the Old Bailey in 8 George I.; it was an indictment for forging a will of a personal estate. On the trial the forgery was proved; but the defendant producing a probate, that was held to be conclusive evidence in support of the will, and the defendant was acquitted. This your Lordships see was a prosecution for a very serious offence indeed—a prosecution for

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the forgery of a will. The forgery is stated to have been actually proved at the trial, but upon the production of a probate from the Ecclesiastical Court, whose decisions are final and conclusive upon such subjects, the defendant was acquitted and the evidence of the forgery rejected. It ought not to have been received, if that circumstance of the probate had been discovered sooner to the Court; but the defendant, perhaps conceiving that there could be no evidence to affect him with the guilt of forgery, withheld the probate; whatever might be the reason it is immaterial, he produced it in time to save himself, for you must receive a probate in the Ecclesiastical Court against the testimony of ten thousand witnesses.

Your Lordships will find the same doctrine in the same book, 1st Sir John Strange's Reports, in the case of *King v. Roberts*, where that defendant exhibited a will in Doctors' Commons, as executor, and demanded probate; after long contest it was determined in favour of the plaintiff; and upon an appeal to the delegates this sentence was confirmed; after the sentence the parties who had brought it about fell out amongst themselves, and discovered that the will which had been proved was a forgery; the manner of giving relief was to grant a commission of review, but the person who had been disappointed and injured by this forgery also preferred a bill of indictment against the persons concerned in the act of forgery. The Chief Justice refused to try the cause whilst the sentence was in force, but insisted that it should stand off till the sentence was laid out of the case by the decision of the Commissioners under that commission of review; my Lords, in this your Lordships find the doctrine recognised in the strongest manner.

The next case which came before the Court of King's Bench is *The King v. Gardell*; it was an indictment prosecuted by Mr. Crawford, a fellow-commoner of Queen's College, for assault upon him. At the trial of the indictment the defendant, who had acted by the orders of the college, produced the acts of the college by which Mr. Crawford was expelled. He came into the garden of the college afterwards with an intent to take possession of his rooms, and the officer of the college took hold of him and conducted him out of the limits of the college; and this was the assault in that indictment, and which was in point of law an assault; and unless the defendant had a defence, or an excuse for his acts, he must have been found guilty. The act of expulsion was given in evidence; an offer was made by Mr. Crawford to prove the invalidity of those acts, that by the constitution of this college more persons were necessary to concur in an act of expulsion than had been present at that time, and other objections were made to the validity of those acts. The learned Judge, before whom that cause came to be tried, conceived himself concluded upon this subject; that as the college had the sole jurisdiction of the cause, their

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decision was conclusive upon him; and it did not signify upon what grounds they had gone, for the effect of their judgment was an excuse of the defendant, and so long as it remained unimpeached and unreversed in the proper course, there could be no doubt but it furnished protection to the defendant, or, to speak more properly, a defence against this indictment. This doctrine not being satisfactory to the gentleman, he brought the business before the Court of King's Bench, and that Court were unanimously of opinion that the Court had done right at the trial of the cause to reject all evidence upon the ground of these acts of expulsion; that the acts themselves, being within the jurisdiction of the college, were sufficient for the defendant to avail himself of; and that it was not competent to the prosecutor of that indictment to show to the Court that these were not regularly or orderly done, or that they were invalid in any respect whatsoever. My Lords, in that case the general doctrine was recognised, that in all Courts of competent jurisdiction their acts, however wrong they are, yet, while they remain in force, are conclusive upon every other Court; the cases of ecclesiastical sentences, and many others, were then mentioned.

I might refer your Lordships' memory to the cases in Exchequer seizures, where condemnations are given constantly without a defence almost, and yet all other Courts are concluded by them. It has been thought so extremely hard a doctrine that judges have wished for the liberty of examining into the fact and to have the matter fully discussed in the Courts; yet when the matter came to be fully argued, the result has ever been that the judgment has been found conclusive upon all other Courts whatever.

Under these authorities for a succession of ages, I confidently rest that your Lordships will, in the present cause, conceive the sentence of the Ecclesiastical Court now produced, in a case clearly within their jurisdiction, in a case in which they have the sole jurisdiction, to be conclusive; no Courts whatever have a direct cognisance of marriage but the Ecclesiastical Court. Suppose a person without any grounds whatever claims a marriage, it may be highly injurious to the lady; she has no remedy but by resorting to an Ecclesiastical Court, because there is no other Court that can bring the matter immediately and directly in question. If a woman separate from her lawful husband, what Court is there to compel her to cohabit with him but the censure of the Ecclesiastical Court? It is that forum which the constitution of this country has entrusted with the decision of the legality of marriages.

As there are not to be found in common law or Ecclesiastical Courts any decision contrary to those I have, with great deference, already submitted to your Lordships' consideration, I trust your Lordships will give that determination upon the validity and effect of this sentence, which Courts of law have ever done when a sentence of the same kind has been a matter of discussion.

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Mr. MANSFIELD—My Lords, I am also to trouble your Lordships in support of that sentence which has been offered to you as conclusive upon the present occasion. The sentence having been read to your Lordships, you are now apprised of the contents of it. The proceedings in the Ecclesiastical Court, of which the noble lady at the bar hopes to avail herself, begin, as your Lordships have heard, by a complaint on her part that Mr. Hervey did, before that suit was commenced, improperly and without ground lay claim to her as his wife; in other words, in the language used in that Court, that he did jactitate that the lady was his wife. The suit being thus begun, the next proceeding in it is the common way, where a person thus called upon means to insist upon a marriage. The defendant in the suit admits that he did claim the lady as his wife, and contends that he had a right to do so, because he was lawfully married to her. Such being his allegation, her Ladyship's answer to it is, that there is no foundation for his claim; that she is not, that she never was his wife; and she states in the allegations made by her, which your Lordships have heard, a great variety of particulars during a very long period of her life in which in the most public manner and upon the most important occasions she was universally reputed, received, and acted as a single woman. After this allegation of hers, the next proceeding was to examine a great variety of witnesses, upon the result of whose testimony follows that which is the important part of the business, that is, the sentence of the Ecclesiastical Judge; which sentence pronounces in the same way in this as in all other suits where two parties litigate a marriage claimed on one side, and denied on the other, that these two parties were free from any matrimonial contract. If that sentence is to have the force which, as it is apprehended by those who sit on this side of the bar, by law it must have, it will, of course, follow that this indictment must fall to the ground; because the sole foundation of the criminal charge is the supposed marriage with Mr. Hervey, which this sentence, if conclusive, must unanswerably prove never to have existed. It must, we submit to your Lordships, follow as a consequence that this is the proper place and point of time to stop; it would be to no purpose for your Lordships to sit here to hear a long story the object of which, when the sentence was conclusive, would only be to give pain to one whose sufferings no one would wish to increase; and at last, after it had been heard, no possible good effect could follow from it. As evidence ought not to be heard, if this sentence is conclusive, because it would be hearing that which could have no intention, no weight, no consequence; so it would be nugatory to state it, and everybody would wish to decline the hearing it for the reasons to which I alluded; and I am persuaded, not only for the sake of the noble lady at the bar, but for the sake of preserving that which every one will always

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think of great importance, that is, uniformity in legal decisions and judicatures, that this sentence must upon this occasion, as I believe on every one has been in which any such sentence has ever been produced in a Court, be deemed decisive and unanswerable.

That it ought to be so upon this occasion I will first endeavour to show to your Lordships by considering the nature of that Act of Parliament upon which the present prosecution is founded and the state of the law before that Act of Parliament was made.

The Act of Parliament creates no new offence; it punishes nothing but what was punishable before, a second marriage while a former existed. Taking a second husband or wife while there was a former in being was undoubtedly an offence long before this statute of King James I.; indeed, as long as the ecclesiastical constitution of this country has subsisted. This Act of Parliament makes no other alteration in the law, but as it subjects persons committing this offence to temporal prosecution and punishment, before this Act such an offence could only be the object of ecclesiastical censure and punishment. But, my Lords, the makers of this statute never dreamt that they were in any respect altering the ecclesiastical constitution of this kingdom, that they were in any instance invading or breaking in upon the rights of the Ecclesiastical Courts. No such thing is to be found in the statute, nothing is to be collected from that; indeed, if you might collect from the preamble to the Act of Parliament, it will appear to every one who reads it that it was not in the imagination of those who framed this law that a second marriage could be made the object of punishment where there had been a sentence which prevented a supposed former marriage being binding upon the parties. When I say that, I allude to the exceptions in the Act, which make no part of your Lordships' present consideration. But besides that the preamble of the Act tells your Lordships what it was that the makers of it had in view. The preamble tells your Lordships that divers evil-disposed persons being married run out of one county into another, or into places where they are not known, and there become to be married, having another husband or wife living, to the great displeasure of God and utter undoing of divers honest men's children and others. Now it never was supposed by the makers of this Act of Parliament that the persons described in the preamble of it would go through the form and ceremony of a trial and litigation and obtain a decision in the Ecclesiastical Court before such second marriage was to take effect, which was to be the object of this law. But it is enough that in this statute there is not anything that tends to diminish or break in upon the dominion of the Ecclesiastical Court, but that the statute left those Courts and the law relating to them just in the same situation as they were before. Now, if this was an offence before the Act, how was it punishable? What would have been

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the operation of such a sentence before this law? Unquestionably a person taking a second husband or wife, the first being living, might have been made the subject of punishment in the Ecclesiastical Courts. Let me suppose a prosecution commenced for that purpose by the second husband or wife, the first husband or wife being living. Those who stand near me, who are much better acquainted with the proceedings of the Ecclesiastical Court than myself, will tell your Lordships that so long as this sentence remains the relation of husband and wife could not exist, which alone must be the foundation of a prosecution; for taking a second husband upon this statute, the Act upon which the whole proceeding is founded, having made no alteration in the case, the law remains the same. It does not follow from thence, nor are your Lordships to suppose it, that such a sentence as this would in the Ecclesiastical Court have made adultery lawful, or have made a marriage with a second husband or wife a good one. Certainly not; but while the sentence subsisted, it would have proved that there was no first marriage at any time by any parties interested. Such a sentence as this may be undone; it is a fundamental rule in all matrimonial causes in the Ecclesiastical Courts, that, in their language, *sententia contra matrimonium non transibit in rem judicatam*. The issue or the kindred of persons entitled to estates may have a variety of reasons for impeaching marriages. As to the continuing in a second marriage, the continuing in adultery, the repeating it is only an increase and aggravation of sin where the first marriage ought to have prevented it. At any time there may be a suit to restore and set up a first marriage, which has been undone by a sentence by accident, by mistake, by collusion, or from any other reason not satisfactory. If all the evidence that could have been had respecting the marriage has not been laid before the spiritual Judge, any party who has any interest may at any time again apply to that Court, again institute a suit, offer new evidence, have that which has been already heard heard again, that the marriage, if it did really exist, may be established by a sentence of that Court. This is I believe clear law, and undoubted in that judicature. If it is, then your Lordships are not to conclude that by any sanction which you give this sentence you either authorise adultery or give effect to second marriages while first marriages subsist; no, at any time that first marriage may be established notwithstanding a sentence against it, when any person shall think fit in a legal way in such judicatures to impeach that sentence. But all that is contended for is, that while that sentence remains the matter is concluded; the marriage cannot be proved to exist; the relation of husband and wife is destroyed.

If this which I have now submitted to your Lordships be, as I apprehend it is, well founded in the known practice and law of these Courts, the consequence I trust will be that this sentence

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must now have the effect under a prosecution upon the present Act of Parliament as it would have had in a prosecution in the Ecclesiastical Court for an adultery or a crime against the first marriage. In that judicature, the only one which by the laws of this country has a regular jurisdiction to inquire into marriages, by a solemn judgment these two parties are declared not to be married; that would have been an answer to any prosecution before the statute. The statute leaves the power of the Ecclesiastical Courts exactly as it was before. Leaving it so, a sentence pronounced by that Court in a cause in which it has clear jurisdiction must, I apprehend, be decisive. But, my Lords, it is undoubted. Various cases, which I shall not trouble your Lordships with the repetition of, have been mentioned which prove that to no purpose can this noble lady at the bar and Mr. Hervey be considered as man and wife, or proved to be man and wife while this sentence subsists. No conjugal duties can be exacted from one to the other. Was a wife starving in the streets, she could not in any way oblige him to contribute to her support. Whilst such a sentence remains the woman cannot be a wife for any beneficial purpose resulting from matrimony. And it will be, I believe, difficult to point out one for which she can be a wife, unless it be for the single purpose of subjecting her to be punished as a felon for marrying a second husband. I can hardly believe that any human creature can be found who would wish that the noble lady at your bar should for this purpose alone, and in this single instance, be deemed a wife when she can be in no other. But if there be any who wish it, I am satisfied your Lordships' wishes will go along with the law as I understand it to be, if the law be so. And that it will be very difficult to convince your Lordships that she, who was not a wife for any other purpose, should be deemed a wife in order to be subjected to criminal punishment for an open, an avowed, and by her thought an honourable marriage with a noble Duke.

In every instance in which an issue in the temporal Courts, in the Courts of common law, is joined upon matrimony, where a marriage is insisted upon on one side and denied on the other; in every instance of that sort we know the temporal Courts decide not; they send to the spiritual Courts to have the matter inquired into and decided upon; nothing is more clear than that rule of law. So it is in cases of dower; where dower is claimed by a widow, where it is denied that she was ever lawfully married to her husband, the temporal Court says it has no power to inquire into the matter, it must refer it to the spiritual Court; and the decision of the Bishop is final upon the point. It is not only in the case of marriage, but in other cases, that the decision of the Ecclesiastical Court is the only competent one, and is final and conclusive to all purposes. So it is upon questions of legitimacy,

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where bastardy is alleged and denied; the common law Courts decide not the point; they send it to the Ecclesiastical Court. So it is with regard to the probate of wills; and no case can be stronger than that which was mentioned to your Lordships, where even upon a criminal accusation, a charge of forgery, an accusation resembling the present, a decision of the Ecclesiastical Court in favour of a will was held to be conclusive evidence upon an indictment for forgery, and that no proof could be received of the fact of forgery in opposition to such a sentence. It is not only so in these instances of the Ecclesiastical Court, there are others with regard to captures; the decisions of the Courts of Admiralty are in like manner conclusive. So the Court of Exchequer upon disputes concerning the revenue. There are many other instances which might be pointed out to your Lordships, in which after the sentences of Courts having competent jurisdiction all other Courts are shut out from inquiry into the matter, however it might appear that such sentences are not founded in truth. This rule is so clear and so well known that I will trouble your Lordships with no particular cases or instances in which any such matter is determined; but there are some that have been already mentioned to your Lordships, and one other which I shall add, to which I shall beg your Lordships' attention on account of another view, which it is necessary for him who would contend for the full force of this sentence to see this subject in.

It may be said, something of that has been hinted already; much we know has been talked out of doors, not all I believe warranted by the fact; but of that now we are not to judge or inquire. But it may be said, in answer to these arguments giving the utmost force to such sentences, let them be final and conclusive as they may, yet if a sentence can be shown to be the effect of agreement and collusion, that it shall not be final, that it shall not have a binding force. If those who are to argue against the effect of this sentence in the extent in which it is now endeavoured to be urged should be at liberty to say that they would attempt to show that this sentence now in question before your Lordships was the effect of what is called in the common law Courts covin or collusion; if there was any ground, as I do most firmly believe there is not, to impute this sentence to any such original, yet before your Lordships I trust it will appear that this is not the place in which any such collusion ought to be inquired into. Those Courts which the constitution has trusted with the investigation and decision of matters relating to marriage are fully equal to the decision of any such collusion. They may undo their sentences where they appear to be collusive; and it is not to be presumed that any collusive sentences would be encouraged in those Courts. Indeed, there is one strong and cogent reason why no such collusive sentences are to be feared in those Courts; because, as I before observed

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to your Lordships, a sentence there, though conclusive while it stands, may at any time be attacked or impeached by those who find an interest in so doing. And if it may, then it would be idle for persons to be collusively obtaining a sentence when any relations that might be affected by issue of a second marriage; in short, any person who has an interest, might overturn and destroy it. This at least is very obvious upon the sentence that is now urged to your Lordships, and the effect of it with regard to the present prosecution; that, if it was to stop the present prosecution, the utmost consequence that would follow from it would be this, that it could only prevent such prosecutions having effect in cases in which in truth the parties, who had to do in the cause in the Ecclesiastical Court, and who obtained the sentence, were so circumstanced that it would not be the interest of any human creature to endeavour to undo their work. And that it is not one of that sort of marriages, such a second marriage, as it was the object of this temporal law, the statute of James I., to make the subject of punishment. It was made on account of temporal mischiefs happening, as recited in the preamble; although it is mentioned and truly mentioned in that statute that such second marriages are to the dishonour of God, and are undoubtedly high offences against religion and the holy ceremony of marriage; yet if that had been the only evil that had been apprehended or found from such second marriages, it is not to be believed, but that the Legislature of this country would have left such marriages to have been considered, inquired into, and punished in those Courts in which all other offences against religion are very properly only cognisable and punishable. It was the temporal mischief that produced that law; and your Lordships may easily judge what apprehensions of any temporal mischief would arise from such weight being given to this sentence as is contended for from prosecutions being stopped by such sentences, when it is clear that sentence cannot do mischief to any human creature who does not choose to sit down and acquiesce under it; for the remotest issue at the greatest distance that can be hurt may commence a suit in the spiritual Court, and may therefore get rid of this sentence. Give it therefore its utmost force, let it weigh as much as is desired in the scale in favour of this lady; it would only go to prevent a prosecution where the marriage undone was of such a sort that no human creature would have an interest to support it. This, I observe to your Lordships, supposing that it may be urged against this sentence, that it will be attempted to be proved to be produced by agreement and collusion.

There are cases, one of which has been already mentioned to your Lordships, that in terms prove that that collusion is not the subject of temporal inquiry, that it ought to be confined to the spiritual Court. There are other cases which seem to me in effect to prove the same thing.

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The case of *Kenn* has already been mentioned to your Lordships. In that case it was an attempt by the issue of that marriage, where there had been a divorce between the parents of that issue, to establish the marriage. In the divorce the sentence had proceeded upon the parties not having been of marriageable age, that is, the man of fourteen, the woman of twelve; that they had never cohabited together, or consented to the marriage after they had attained to marriageable years, to the years of consent as they are called. But who is it attempts to undo that marriage?—the child who was born of those parents, cohabiting together long after they had attained the age of consent; and yet that issue was not heard. No, the sentence was held to be conclusive; a sentence proceeding clearly upon a ground which must be false, stating that the parties were not of the age of consent, stating that they had never consented after they had attained that age, when it was an undoubted fact, indeed the existence of that issue, which litigated it, proved that they must have consented to the marriage after the age of consent.

The next case that I would suggest to your Lordships is one that has not been mentioned, but which appears to me to be extremely strong to the present purpose. It is the case of *Morris v. Webber*, in Moore's Reports, 225. The case, in short, was this—Two persons, one of the name of Berry and the other of Wilmot Gifford, had been married; they had been married some years; they had no offspring; a suit was commenced in the spiritual Court for a divorce; a sentence was pronounced, which in the words of the book are *propter vitium perpetuum et impotentiam generationis* in the husband. The sentence having so proceeded, not long afterwards both these parties married again, and each by the second marriage had several children. Some years afterwards a cause arose, in which it became a question whether the issue by the second marriage of the husband thus divorced could be legitimate? It was contended that those subsequent children by that husband had proved, and irrefragably proved, that the foundation of the divorce was false; that there could not be that *vitium perpetuum* which was made the ground of the divorce. The common law Court, before whom this question came, clearly held that that was necessarily proved by the subsequent children which that husband had had; but still clear as it was, that this sentence was founded in an apparent falsehood, yet it must stand. It is the sentence of that Court to which the constitution of the country has entrusted the decision of such matters; it is not for our Courts to inquire into it; we should usurp a jurisdiction which does not belong to us; and upon that ground it was determined that till that sentence of divorce was undone in the Ecclesiastical Court it must be binding and conclusive, and the issue of the second marriage must be deemed legitimate. No cases can well be

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imagined stronger than these to show that even sentences founded in agreement, founded on what may be called collusion of the parties, are yet binding till they are rescinded in that Court, to which alone the law of England has entrusted and confined the consideration of such matters.

Another case which has already been mentioned to your Lordships is the case of *Hatfield v. Hatfield*, which seems to me also to decide this point, and to decide in terms. The case has been already fully stated to your Lordships; I need, therefore, only point out one or two particulars of it. There was a dispute between the heir of one Hatfield and a woman who claimed to be the widow of the father of that heir; he insisted upon it that she was not the wife of Hatfield, his father, because she had been married to one Porter; the marriage with Porter was proved; Porter, who was a party to the suit in the Court of Equity, admitted it upon his oath. A release was obtained by the heir from that Porter. In order to get rid of this release, and though the fact of marriage was proved in the clearest terms, the woman commenced a suit for jactitation of marriage against Porter in the spiritual Court; a sentence upon his not appearing was pronounced in that Court against him, and that was held in the House of Lords to be conclusive. Those who went before your Lordships, then sitting in judicature, said this was a sentence by a Court which had the alone jurisdiction of the matter, and while it stood it must decide. The books that take notice of this case expressly say that the sentence was considered—indeed, after the case stated to your Lordships, it could not but be so considered—as collusive, I think is one of the words to be found in the books; and yet, though appearing to be a feigned and collusive sentence, the answer was that collusion is to be judged of alone in the Court where the original matter arises which has alone jurisdiction upon the subject; no other Court can consider it.

I am aware that it may be said in answer to this case that this was in a Court of Equity, which had no jurisdiction to inquire into questions concerning marriage in the Ecclesiastical Court. My Lords, that is no answer; for wherever a sentence founded in agreement between parties is used to the prejudice of a third person, in whatever Court it is, unless the subject be of such a nature that it is exclusively confined to the particular Court in which it arises, wherever such a sentence is attempted to be used against a third person, that third person may avail himself of the collusion upon which it is founded. For how is it that in all common cases where questions arise about collusive sentences that the party against whom they are used gets rid of them? In order to do that no proceeding is requisite in the Court in which the sentence is. No; the person against whom it is urged says, however, that sentence may be between you two who are parties

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to it, however it may bind you, it is founded in agreement between you two, and it is nothing to me; as against me it is void. Thus in the common case of executors a creditor has a right to be paid out of the effects left by a dead person who is debtor. The executor intending to cheat the creditor by an agreement with another person, who is no real creditor, prevails upon him to commence a suit, and suffers judgment to pass at the instance of such a friend, by which he is made the original creditor, and the executor, as representative, debtor to the person so suing by agreement. The real creditor cannot pursue any steps to undo the judgment. No; he says, by way of answer, that judgment is void against me; you two persons agreeing and colluding together shall not turn the forms of law to my prejudice. And as this may be done in one case, why not in every other, where a judgment or a sentence founded upon collusion is used against a third person who has no way to answer it but by saying at once it is void against me, however it may stand good between you?

This, my Lords, is the way in which all judgments by collusion or by covin in my knowledge are answered and got rid of. But in the case of *Hatfield v. Hatfield*, which I last alluded to, it is answered that the Court of Equity, and the House of Lords judging as a Court of Equity, had no authority to inquire at all into a matter depending in the Ecclesiastical Court relating to marriage, because that Court hath an exclusive jurisdiction upon the subject; and yet in that case and in this there could be no reason, I submit to your Lordships, why, if an agreement of the parties could be a ground for impeaching a judgment, it might not be as well done in that judicature as in this?

When I am speaking of any arguments that one may suppose to be urged from an attempt to prove collusion, there are differences between any such judgments as are got rid of by a third person, because prejudicial to him, and founded upon an agreement between two parties to a suit with which he has nothing to do. Is that the present case? No third person that has an interest attempts now to set aside this judgment. The object here is to annul the judgment as between the parties to that suit. In all the cases that can be referred to where questions arise upon judgments passing by agreement, intended to be levelled against a third person—in all such cases, as between the parties, the judgment stands good. The object of those who in such respects impeach the judgment is merely to prevent its having effect against those who are strangers to it. But here this judgment, this sentence, must, as between the parties, be totally undone and annihilated, or else it decides the question; because unless it is undone, if it stands good between those two parties till properly impeached in the Ecclesiastical Court, why, then, they are not husband and wife. And this consideration materially distin-

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guishes such a judgment, so impeached as the present is, from the common case in which judgments are to be effected, not so as to be avoided between the parties between whom they stand good, but as being laid aside more properly than being avoided, so as not to be turned to the prejudice of a third person who is not a party to them.

Another distinction which I have before suggested to your Lordships, which I remind your Lordships of, as upon the present head of the arguments I am suggesting to your Lordships, there is this difference between all the cases that can be brought before your Lordships upon the head of collusion or agreement; in all those cases, in such as I have alluded to, and a hundred others might be put which fall within the same rule as a judgment set on foot by an executor to defraud an honest creditor: in such cases the parties have no way themselves to commence a suit to set aside this judgment; their mode of doing it is, when the judgment is used against them, answering, whatever the judgment may be as between you two, as to me it is void. But there is no regular process of law, no suit to be commenced, by which any such judgment can be set aside by a third person. There is no suit. If it could be done at all, it must be done in a manner which furnishes argument in support of the present sentence, because it could only be done by an application to that Court in which such a judgment is given; another Court may say, where it is attempted to be used, that if it be proved to be founded in agreement by those who are parties to it, it shall not be turned against a third person; but no other Court but that in which the judgment is given can set it aside and annul it.

These distinctions clearly appear, as I submit to your Lordships, in such cases where such judgments are attempted to be got rid of by third persons as detrimental to their interests. But I believe I can produce to your Lordships a legislative instance that a collusive judgment in the spiritual Court cannot be set aside after once given, that it is final and conclusive. I have already mentioned it to your Lordships as one of those points arising in Courts of justice, upon which all consideration is confined to the Ecclesiastical Courts. None is more important than a question concerning bastardy or legitimacy. The way, your Lordships know, in which that question is sent to be tried by the Ecclesiastical Court is this—In actions of various sorts, where a person claims a title by descent, the legitimacy of his birth becomes material; if the party against whom he claims says that he is a bastard, and upon that an issue is joined, the common law Courts in which the question arises send the matter to the Ecclesiastical Court to be inquired of and decided. In answer to a writ for that purpose going from the common law Court the Ecclesiastical Judge makes a certificate, and he certifies that the party is a bastard, or is legitimate. That

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certificate is conclusive; it is not only conclusive between the parties to the suit, it is conclusive to all the world; it never can be touched or moved again; that certificate once received, that record in the common law Courts is final for ever.

To prevent the mischiefs that might arise from such transactions happening by agreement, and a false certificate obtained by collusion, depriving persons of their legal rights, various forms are now requisite by an Act of Parliament, which I will state to your Lordships that originally were not so. Various proclamations are necessary in the Court of Chancery, and likewise in the Court of common law, in which such question arises, in order to give universal notice to all persons who may by possibility be interested, that such a question is to be sent to the Ecclesiastical Court. But before that Act of Parliament no such proclamations were necessary. The Act of Parliament will show your Lordships what then was the effect of a collusive sentence in the spiritual Court upon the subject of bastardy; and the sentence of that Court was conclusive, and could not be touched by any temporal judicature. The Act of Parliament was made in 9 King Henry VI. cap. 11. The title of the Act is, "Proclamations before a Writ be awarded to a Bishop to certify Bastardy." The preamble of the Act before it comes to the enacting part is very long. I need not read the whole of it to your Lordships. It is in substance this—"That several persons, who are named as petitioning in the law, who claim, some as sisters, and others as claiming under sisters, to be heirs of Edmond Earl of Kent, were apprehensive of the effect of a collusive certificate that would be obtained by Eleanor, the wife of James Lord Audley, who pretended herself to be the daughter of that Edmond Earl of Kent; and the meaning of the Act was to prevent the effect of such a collusive certificate, which was apprehended would be obtained by this Eleanor, wife of James Lord Audley; and stating that there was no foundation for any such pretence. That she was not the daughter of the said Edmond, the Act goes on to say; nevertheless the said Eleanor, the wife of James, upon great subtilty, process imagined, privy labour, and other means and coloured ways, to the intent that she ought to be certified Mulier by some Ordinary, in case that bastardy should be alleged in her person, hath brought, as it is said, in examination before certain judges in the spiritual Court, knowing nothing of these contrivances, certain suborned proofs and persons of her assent and covin, deposing for her, that she was begotten within marriage had and solemnised between the said Edmund and Constance, late wife of Thomas Lord Despenser; so that it is very likely that the same Ordinary would certify the said Eleanor the wife of James Mulier, which certificate so had and made ought, by the law of England, to disherit the said Duchess, Duke of York, Earl of Salisbury, Earl of Westmoreland, John Earl of

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Typtoff, Alice, Joyce, and Henry, and their issue for ever, of the whole inheritance aforesaid." Thus, your Lordships see, it is stated that such a certificate, so obtained by the most flagrant covin and collusion, which is stated here in this preamble of the Act, is said to have such effect that it ought by the law of England to disinherit the heirs and their issue for ever, through a certificate most palpably obtained upon the grossest fraud and collusion. Then it goes on to provide, "Whereupon the premises tenderly considered and to eschew such subtle disherisons, as well in the said case as in other cases like in time to come; by the advice and assent of the Lords, and at the request of the said Commons, it is ordained, 'That if Eleanor, the wife of James, be certified Mulier, that no manner of certificate shall in anywise put to prejudice, bind, endamage, or conclude any person but him or his heirs that was a party to the plea.'" Thus it provides a remedy in that particular case. Then it goes on to enact that in future all proceedings of this sort shall be attended with different proclamations that are ordered by that Act, that it may in future be known when such certificate will be applied for to the spiritual Courts, and that all parties interested may have notice to make their objections. Now, my Lords, what will be said of the effect, the weight, the authority of ecclesiastical sentences in this part of the law after the Act of Parliament? Does it not appear by this law that the certificate, in other words the decision, of the Ecclesiastical Court in a case of bastardy, even though founded upon collusion, was decisive, when once it was formally received from the Ecclesiastical Judge? And if it was so, will it be at all a stretch of the authority of that judicature now to say that a sentence in a cause of marriage, which is as peculiarly to be confined to their jurisdiction, ought to have the same force? And if it is not to have the same force, will it not be breaking in upon or evading that jurisdiction in a way which your Lordships' predecessors have never done, if you should now suffer this sentence in another place to be impeached and overturned?

Your Lordships will remark that in those cases which your Lordships have been referred to there is one, the case of forgery, which is the case of *Farr*, that is more exactly like the present, and where a decision of the spiritual Court upon a will is held to be decisive against the clearest proof of forgery. But with respect to the other cases your Lordships will observe that they are all civil cases. And if this difference and respect is to be paid to sentences by the ecclesiastical judicature in civil causes, I am sure I need not observe to your Lordships that in criminal causes, where the noble lady at your Lordships' bar is to be entitled to every indulgence, to every favour, these decisions do from that consideration acquire double force.

It may be said, what did this Act of Parliament of James I.

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mean? that when there had been such a sentence as this, though those who were parties to it knew that they were in truth man and wife, that after such a sentence either of the parties, so knowing that they were man and wife, should be at liberty to marry again without incurring the penalties of this statute? In answer to that it may be replied, that whilst this sentence stands, if there be any weight in the arguments urged in support of it, it is not to be presumed that it was so, or could be so, known to the parties; because that was to impeach the sentence. But another answer occurs from the Act itself; for the Act did not mean in all cases to punish a second marriage where the former husband and wife were found to be living; because there is an exception in the Act, an exception which permits, I mean so as not to make it punishable, permits a marriage with a second husband or wife, even though the former be living, and be known to be living. Let but the sea be placed between the husband and wife for seven years, though they know each other to be living, the law takes not place; they are not the subjects of punishment. That I take to be extremely clear. The circumstance of knowledge does not necessarily import that a person marrying a second husband or wife must be subject to the penalties of this law on account of that knowledge of the first husband or wife being living. As to the immorality of the case, as to the effect against religion, against the eternal sacred obligation of marriage, it remains exactly the same, whether the husband is on this side the channel or the other. But the law has said in that case, though the ceremony of marriage would be thus offended against, though the obligation would be so far violated, that a husband or wife, knowing that the other husband or wife were living, should take a second; yet that knowledge is not sufficient within the Act in that instance to subject the party to punishment. It is not, therefore, in every case that the taking a second husband or wife, even with knowledge that there is a former subsisting, will subject a party to punishment; that the Act says. It is not a part of the present question before your Lordships. To suppose that after this sentence the noble lady at your bar could be so well acquainted with the ecclesiastical law as to know that this sentence would not be binding; that is too absurd to suppose. If a sentence in the Ecclesiastical Court is to have that weight, which it has had from the earliest times; if the same rule is to take place in criminal Courts of judicature and in favour of the criminal, which has been again and again established in civil causes, then this sentence is conclusive. There will be an end of the present prosecution. And your Lordships will not forget, what I did before take the liberty to suggest to your Lordships, that giving the utmost sanction to this sentence, you never bastardise issue, you never disturb families, you never deprive individuals of their right; because every human creature

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who is at all interested to dispute a sentence against a marriage, who wishes to set up or support it, may at any time apply to the Ecclesiastical Court, and there have the marriage set up again and established. No cause, therefore, can ever pass in which a marriage will remain undone by such a sentence, except where there is no human creature who thinks it worth their while to endeavour to support it. And this temporal law may surely very well go uninforced while a sentence stands, and on account of that sentence which, with the utmost weight and credit given to it, can produce no temporal mischief. If it be wrong, if the parties to it in procuring it did wrong, it may at any time be undone in the Ecclesiastical Court; and as to the offence against the right of marriage, against the religious constitution of the kingdom, that Court may at any time effectually punish those who have been guilty of any such offence, who have improperly married a second husband or wife, who have improperly attempted to get rid of a marriage that was legally established.

And, therefore, upon the whole I submit to your Lordships that upon the authorities of law there is no ground to impeach or attack this sentence; that it is final; it is conclusive; of course no other evidence ought to be received impeaching this marriage; that the indictment therefore must fall; and that, as no evidence can be received, it would be idle, impertinent, and of no use to state it.

Dr. CALVERT—My Lords, it is my duty likewise to trespass a little upon your Lordships' patience on the same side with the gentlemen who have gone before me, though this question has been by them considered in the widest extent of view that I believe it is capable of. The motion now made by the noble lady at your Lordships' bar is this, that having that species of evidence which she apprehends is conclusive in her favour, and precludes the prosecutor from going into any evidence on his part, it may be received by your Lordships as the only matter proper to take into consideration. That evidence which Her Grace offers is a sentence in the Ecclesiastical Court, pronounced in a due suit thereupon, in a direct line of marriage, the purport of which was that there was no marriage subsisting between the Honourable Mr. Augustus Hervey and the noble lady at the bar, as the indictment lays there was, at the time she married the late Duke of Kingston, that marriage being the sole foundation of this accusation; for if that fails, the marriage with the Duke of Kingston was perfectly innocent. If this is a proof, such a one as your Lordships by law ought to abide by, that there was no such marriage subsisting between them, to go into evidence of any sort must be totally nugatory.

It is well known that by the constitution of this Kingdom there are different Courts appointed for the litigation of different

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questions; these Courts are, as the constitution supposes, well adapted to the purposes, and exercise that jurisdiction which can take up the point originally, and determine it directly; and it is contended that, while that determination subsists, it ought to have its effect in all other places and in all other Courts where there shall be occasion to make use of it.

This is not asserted only of one species of Courts, I mean the Ecclesiastical Courts, but it applies, I apprehend, to sentences of all others whatever, that when a judgment has been given by any Court having original and direct jurisdiction, though that may incidentally come before another Court, yet they don't go into that question which has by a competent judicature been before determined.

It is true it is impossible for any Courts to continue to exercise their jurisdiction for any considerable time without many questions incidentally arising, which are not really and originally within their jurisdiction, many of ecclesiastical cognisance; and for the purpose of determining that cause, if the incidental point has not already had a decision in an Ecclesiastical Court, they must be gone into; because if they were not, there would be no end of the interruption of justice. Many questions arise in the Ecclesiastical Courts, which are originally of common law jurisdiction, yet the Ecclesiastical Court must go so far into that consideration as to see whether the pretence be true. For the purpose only of determining the cause then before that Court they could not have originally determined this question. Suppose, for instance, a legatee claiming a legacy in an Ecclesiastical Court, the executor may plead a release; now the validity or invalidity of that release is originally cognisable by the common law Courts and no other, yet the Ecclesiastical Judge must so far take that plea into consideration as to see whether there is *prima facie* a release or no. But it was pleaded in reply that there had been a question upon that release at common law, that it had been there put in issue, and that there was a verdict against that release. I apprehend that no Ecclesiastical Judge then would think himself at liberty to enter into the question whether it was a good release or no, but the verdict must be taken as true, because the Court, though incidentally it was obliged to take notice of it, has not a jurisdiction to determine the original question.

This may be applied to the question that is now before your Lordships. Marriage causes are peculiarly by the constitution given to the Ecclesiastical Courts; they alone can determine an original and direct question of marriage as between the parties; and if determinations of Courts, having original and direct jurisdiction, are to receive weight and meet with credit from all other, then the determinations of Ecclesiastical Courts upon marriage ought, wherever they come in question in any other Court, likewise

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to be received as conclusive. The obvious reason of this strikes me to be, because though every Court can determine in some measure a question merely as applied to what is then before them, yet they cannot determine it generally, they cannot determine the very question as applicable to other purposes. As, for instance, suppose any temporal right under a marriage is to be considered in a common law Court, and it may be necessary for that purpose to inquire whether there be such a marriage, the general question, whether such persons are to all intents and purposes man and wife, whether they are bound by the obligations of duty arising from that state, is certainly not to be determined but in a Court of ecclesiastical jurisdiction; and when that Court has been in possession of the original and general question, and has determined it, for the common law Court to enter into it might be in effect to alter and undo a judgment as far as the confederation then is before the Court, which certainly that Court has no jurisdiction to do. That this is to be received as a general position, I apprehend, is supportable upon this ground, upon the great incongruity of sentences which otherwise must arise. Now, suppose there be a sentence in a Court that has the original jurisdiction to determine marriages between man and wife, to determine upon the state of those persons, whether they are in fact in that relationship, all determinations upon that question in any other Court may be directly contradictory to that sentence, which still must remain; for the parties will and must remain man and wife, or the contrary not man and wife, according as the sentence was, if that question has been directly determined in an Ecclesiastical Court; and any determination that would be given by another Court may be contrary to that obligation and that connection with the Court, having a power, has determined was between them. On these considerations, therefore, I apprehend it is, that whenever a question of matrimony has arisen in any common law Court, if there has been no determination in the Ecclesiastical Court, the question may be open; but if that question has ever come directly in point before the Court having direct jurisdiction to determine it, I apprehend to this time there always has been such credit given to the sentence, that it is taken to be conclusive and be determined between the parties.

This distinction was made, I conceive, upon the best grounds, so long ago as that case alluded to by the learned gentlemen who have gone before me, I mean *Kenn's* case, reported by Sir Edward Coke; that was in the reign of King James I. In that case there is cited the case of *Corbett*, which was as early as Edward IV. Taking the doctrine laid down upon these two cases together, the position there established, and I trust adhered to ever since, is this, that when there has been a question of marriage litigated by the parties themselves in a proper Court, and the question has

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been determined upon the marriage, the sentence will always hold good till it is reversed by that Court. So much was determined in the case of *Kenn*. In the case of *Corbett* it was determined that where one of the parties is dead, and no such sentence was had between the parties while living, a person cannot commence proceedings in the Ecclesiastical Court relative to that marriage. The reason is, that then the object of such a suit must be temporal considerations only, it must be to bastardise issue, or it must be for some purposes which the Ecclesiastical Court has not original jurisdiction of; but the mere question of marriage, of connection between man and wife, can never come into question, nor ought it to be litigated, after the death of the parties. Therefore, the Ecclesiastical Court, after the death of the parties, does not entertain that suit, nor can it be legally commenced.

There are a variety of cases which have been determined that have been quoted already to your Lordships, and which I should be very sorry to take up your time in repeating; but it seems to me on those authorities to have been established, that as often as these sentences have been pleaded they have been allowed, whether they were sentences in causes of nullity of marriage or in jactitation of marriage.

If danger is to be apprehended from too much credit being given to such sentences, left for improper purposes they might be unduly obtained, there seems to be less danger in questions that arise upon marriage than in any other, for this reason, that there can be no determination against a marriage but what is open to future litigation. We all know that in a question of marriage any person that has an interest may intervene before sentence given, and any person having an interest, though they have neglected to intervene in that cause, might appeal within the proper time. Nay, I will go so far to say that if any person having an interest should have so far neglected it as to omit availing himself of an intervention or appeal, yet he might still come before the Court, show his interest, and be heard. A marriage cause goes further still, for I believe in most other cases a determination would be for ever binding, at least to the parties; but in these questions I conceive it is not, for if there was to be a question between a husband and wife in a cause of jactitation, and, as in this cause, it was determined that there was no marriage, yet the party against whom that sentence was obtained, I apprehend, might appear afterwards, he might produce any new proof that he did not know of at that time, or even, if he had not produced what proof he had, he might be heard upon it. The reason of that indulgence I take to be this—By the canon law a marriage was held to be indissoluble, and for that reason a sentence against it never could be final: *Sententia contra matrimonium nunquam transit in rem judicatam*. The canon law, it is well known, has

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been received in this country with respect to marriage, particularly as to that position of its being indissoluble. In most other questions, as of property, a person might be bound by time, bound by not making so good a case as he should have done; but as a person cannot release himself from the obligations of marriage by any lapse of time, or any neglect in stating his case, the question is ever open; therefore these cases are certainly the least dangerous, because if anybody appears, who apprehends himself injured in this matter, and has an interest, to show that this judgment was not duly obtained, he may be heard; but while such a sentence remains unimpeached I apprehend it is conclusive. The sentence now before your Lordships is a sentence in a cause of jactitation; it has been supposed upon the authorities, many of which have been cited to your Lordships to-day, that when a sentence determining upon this point has been offered in any Court coming in incidentally, it has been constantly received. But, my Lords, it has been received with this restriction, as it is laid down expressly in *Blackham's* case, which has been already quoted, it must be where the marriage has been directly in issue; for if it be an incidental point only, it would not then be satisfactory. In *Blackham's* case, where the question arose upon the grant of an administration, it was argued that the Ecclesiastical Court, having determined upon that administration, they had virtually determined the marriage, and therefore it was binding upon all parties; but it was said No, the question must be originally and directly upon the marriage, or it shall not have effect; and the distinction seems to be exceedingly good.

In order to bring the present case, therefore, within this principle it is necessary to show that the sentence now under your Lordships' consideration is a direct determination upon a marriage, because, if it be not, it would be liable to the objection which I have now stated.

The proceeding is that of a cause of jactitation, which is begun by a man or woman. In this cause it was the woman calling upon the person who claims to be the husband for having boasted and asserted that lady to be his wife to abstain from such assertions for the future.

Here the question originally seems to be whether the person called upon had ever really claimed the lady. In that stage of the cause, if the claim had not gone as far as a justification, some of the books assimilate this proceeding to a cause of defamation, supposing it to be a case of words only; and when upon a marriage being pleaded to justify the claim, the question turns upon that marriage, it may perhaps be argued that it is not a direct case of marriage, but an incidental one only. It may not therefore be improper to consider it in this case, lest such an observation should be made. I take it that when in a cause of jactitation the

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defendant gives in a plea stating a marriage, and that marriage is contradicted by the plaintiff, though it is intended indeed as a defence to the accusation for which he is called upon to answer, that of having claimed the lady, yet the question then alters its nature; the plea is not only intended to entitle the defendant to his admission, but the Court is then in possession of the question whether there was a marriage between the parties, and the determination is direct upon a marriage. If the marriage be proved, there is the same sentence passed as in a matrimonial cause; there is a sentence directly pronouncing there was a marriage, the parties are pronounced to be man and wife, and they might be admonished to restore to each other conjugal rights. If, on the contrary, the defendant should fail in proof, the determination is this, that the party has failed in his justificatory matter, and the sentence in this case goes that the Judge has found that he has failed in the proof of the marriage alleged to have been had between them, he is declared to be free from all matrimonial contracts, and enjoined not to boast in future; it would be, therefore, a fallacy to argue that this is not a direct determination of the question of marriage. It is, indeed, ingrafted upon the original cause of jactitation, but that is agreeable and consonant to practice in other instances. It is not a monstrous thing to assert that a cause may change its nature from its original institution.

[At a motion of one of the Peers part of the sentence read.]

Dr. CALVERT—Unacquainted as I am with the proceedings of this high and august Court, which I never had the honour to appear in before, I conceive it is my duty to take immediate notice of those words which have been read, as I suppose they were called for, because I ought to confine my observations to them before I go any further. The lady who is the object of that inquiry is pronounced to be a spinster, as far as yet appears.

These words are inserted in this sentence, and I apprehend are in every sentence of this nature, the purport of which, I trust, means this, that the case is open to future disquisition upon the principles that have been already stated; that though the Judge determines upon the evidence that is then before him, yet the parties, having an interest to bring that question on again, may be heard. As far as yet appears to us, says the Judge, the lady is free from all matrimonial contracts, and as long as that sentence remains I mean to argue that it is a conclusive sentence. I don't mean that the Court is precluded from another inquiry; I have stated that no parties are precluded from another inquiry; and I conceive the meaning of those words are to express that, according to the light which then appears to the Court, the Court pronounces the sentence; but a sentence of that sort is not from thence to be argued to be nugatory, and that the Court determines nothing; the Court determines upon what it has heard; and as

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long as that sentence remains that is the way in which I meant to put it, it is decisive and conclusive.

I have said that, though the cause began originally upon the one party calling on the other to justify his claim as husband in a cause of jactitation, it is nothing monstrous to suppose it has so far changed its nature as to become a marriage cause; and I will mention other cases in which the Ecclesiastical Courts, as is well known to the practitioners in those Courts, adopt and admit of a similar practice. Suppose, for instance, a man was to bring a suit against his wife for the restitution of conjugal rights; in bar of that restitution the woman may plead adultery or cruelty in the husband, which is certainly a reason against admonishing her to return home to her husband, but, my Lords, this is not all that the Court would do in such a case, for she having pleaded adultery, that plea becomes in fact a libel in the cause, and it will become a cause of adultery; and I have known within my memory, and since my attendance at the bar, instances of that sort. In the case of *Mathews v. Mathews*, determined in 1770 in the consistory of London, the wife pleaded adultery in bar to restitution; the cause went on in that suit, and there was a sentence of divorce. Would anybody contend that it was not as direct a sentence of divorce as if it had been so originally instituted? And in case either of those parties had married again during that divorce, and an indictment had been preferred for polygamy, can it be contended that this sentence of divorce would not be a defence under the proviso in the body of the Act?

Another instance: Suppose a man brings a suit for separation by reason of adultery against his wife, the wife may recriminate, and may give in an allegation pleading adultery in the husband; the prayer indeed on each side would be for a separation; but there is a very considerable difference between a sentence for separation formed upon a crime being in the man or in the woman, whether it is at the suit of one or the other; but if the party that is defendant in the original suit should go on and prove that adultery, and the plaintiff should not, the defendant would be entitled not only to a dismissal from the suit the plaintiff originally brought, but to a separation upon account of the adultery pleaded by the defendant.

I mention these cases to show that it is not enormous to suppose that, though the original question might begin in a cause of jactitation, yet the marriage being pleaded, the sentence either one way or the other is and must be as determinate as if the question had originally been upon marriage. There is a case that was litigated in the Ecclesiastical Court not long ago, and which at the time was much talked of, and is well known; I mean the case of Mr. Thomas Hervey, who brought a suit of jactitation of marriage in the Consistory Court of London against Mrs. Hervey. In

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that Court a marriage was pleaded, the sentence was against that marriage; the same was affirmed in the Court of Arches; but when it was appealed to the Court of Delegates they reversed this judgment and pronounced for the marriage, pronounced not only that Mrs. Hervey was justified in her jactitation, but pronounced expressly and directly for the marriage; and I believe nobody will doubt but that marriage was as conclusively determined between them as if it had been originally a marriage cause or a suit of nullity of marriage. That these sentences have been held to be conclusive in the Courts of common law, where they have been offered, those many instances that have been mentioned seem to me to put it out of all doubt.

It will not be improper to consider what effect a sentence of this sort would have in the Ecclesiastical Court; and I shall contend that, while a sentence of this sort is existing, a wife could not be heard to have any claim upon her husband; she could not claim the restitution of conjugal rights; there is no light in which she would be understood to be the wife until the marriage be again brought into question. There is a case in print that seems to me to go exactly to the point I am now contending for; it is in the case of *Clews v. Bathurst*, which has been mentioned already to your Lordships, as reported in *Strange*, 961; but, my Lords, that case is reported likewise in another book, a book lately published, which I am told is good authority, and the cases well and correctly taken; it is called "Cases in the Time of Lord Hardwicke," and it is to be found in p. 11. There the case is stated a little more at large, and a case is said to be quoted by Dr. Lee, of *Mellisent v. Mellisent* in the year 1718; in that case a woman had claimed to be the wife of a Mr. Mellisent. Mellisent libelled her in the Ecclesiastical Court in a jactitation of marriage; she pleaded a marriage, but failed in the proof, and there was a sentence, I apprehend, of the same sort as in this cause. After the death of her husband the woman would have made out her right to the administration, and for that purpose she pleaded her marriage; that must have originally begun in the inferior Court, and from the nature of the suit, I suppose, came from the Prerogative; but, however, the determination I am alluding to was in the Court of Delegates; it was determined, as there remained in force a sentence which was a bar to her, she could not be heard to make out her case as a widow to the deceased. Your Lordships very well know that, though the Prerogative is an Ecclesiastical Court, yet the jurisdiction of that Court is confined merely to probates and administrations, and it does not entertain causes of marriage. Mrs. Mellisent there claiming as the widow of the deceased in that Court where the sentence of the marriage could not be set aside, it was held, there being a sentence in a cause of jactitation, in which the marriage was pronounced against, she could not claim

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as widow. In that case the Prerogative Court held the same, as we are contending your Lordships will upon this occasion.

There was another case in the Prerogative Court in the year 1771, *Lady Mayo v. Brown*. The question arose upon an administration to Gertrude Brown, who died intestate. Administration had been granted to Stephen Brown as her husband, he having married her in the year 1720. Afterwards that administration was called in by Lady Mayo, a daughter by a former husband; and she contended that Brown had no right to that administration, inasmuch as at the time he married Gertrude he was already the husband of one Eleanor Cutts. In answer to that it was pleaded that there had been a suit of jactitation of marriage brought by Brown against Cutts, in which the marriage was pronounced against, and he was pronounced to be free from all matrimonial contracts with Eleanor. In answer to that another plea was given, stating that it was a collusive suit, that they could show fraud and collusion. The admission of this allegation came on to be debated before the Judge of the Prerogative, and thus far the Judge said, there being a sentence now in another Court (this was in the Consistory of London) by which it is pronounced that this person was free from matrimonial contract, this Court cannot admit this allegation; and all proceedings in that Court were stopped, that is, that allegation was not admitted till the party, if she thought proper, might go to the proper Court to reverse it. Nothing has been done in that cause since; and I conceive, in all probability, never will. I apprehend, therefore, that this sentence, which is now under your Lordships' consideration, must, as long as it remains in force, be held to be conclusive, for this reason, because, though it can be inquired into, yet it is not now even in a way of litigation, nothing has been done to repeal it, nor are there any steps towards it, but it remains in its full force.

The learned gentlemen who have gone before me have thought proper, in order to obviate any objections that may arise, to consider what would be the case, supposing it should be urged by the counsel on the other side, that the prosecutor would undertake to show that this was a fraudulent sentence and obtained by collusion. My Lords, the reason of our mentioning that is, not on supposition or belief that there would come out any such practices in the present cause, but that, taking it up as we do as a previous question, it is our duty to consider it even in the most disadvantageous view, and to maintain that in no case which they can suppose ought evidence to be received against the sentence; and upon that head I apprehend that every argument which can be adduced to show that the consideration of truth or the want of truth in such a sentence ought not to be gone into by this Court, may with equal propriety be applied against going into the question of collusion, because

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that Court which gave the sentence is open to that inquiry, and, I apprehend, alone proper and competent to the purpose. How vague and unsatisfactory must be the inquiry of different Courts proceeding upon different matter, different principles, even the terms made use of quite different! Should they inquire into the question, whether the proceedings were fair or not, it may be productive of error. Suppose it should be shown in some particular that there was evidence supplied, how would it appear the judgment did depend upon that ground? Their entering into the proof of collusion would be as strongly exceptionable as their inquiring into the right or propriety of the sentence, whether it was duly and rightfully pronounced by the Judge, which is an exercise of jurisdiction which no independent Court has over the sentences or judgments of another. Your Lordships are well acquainted that there is no appellate jurisdiction in a criminal Court over an Ecclesiastical Court; the question can only be, whether that sentence shall be received as final and conclusive. But the method in which it was obtained, whether it was rightly and duly pronounced, are very good questions for a Court of Appeal, which can reverse that sentence; but an inquiry into the method of obtaining it is improper as long as the sentence remains. If, then, a sentence of this sort will be held to be conclusive and satisfactory in all civil questions, and I conceive the authorities which have been quoted will be sufficient to establish that principle, surely it will much more strongly apply to all criminal cases; because your Lordships will see it to be the strangest proposition to maintain, that when a man or woman are not to be considered as husband and wife to any civil purpose, yet they shall be so only for the purpose of punishment; this surely would be the greatest absurdity. Yet supposing the sentence not repealed, which imports the man and woman are not husband and wife, and suppose that be the general sentence that ought to apply to them in every situation whatever, though the criminal jurisdiction should go on to pass censure upon the person accused (for that is all the criminal jurisdiction can do) that will not destroy the sentence in the Ecclesiastical Court, and they will remain not husband and wife, though the criminal Court should punish one of them for what is supposed a second marriage.

I suppose it will not be contended that a determination before a criminal judicature ought to have the effect of a determination directly upon the marriage. I apprehend that in point of law it cannot be supposed it should be so argued. Your Lordships will see the injustice of such a proceeding then would be prodigious, because then a criminal jurisdiction must determine upon the rights of many persons who have not a possibility of being heard. Keep their question in the civil Court, adhere to the determination of that Court that has an original jurisdiction; there all parties might have been heard, and they may in future, if they can set

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up any interest; but a determination in a criminal Court that might apply in the most remote degree to determine civil causes would be the most manifest injustice, because no persons could be heard for their interest.

The question for your Lordships' determination, if it should be ever gone into, will be upon the marriage said to be had with Mr. Hervey; any determination here that may affect that right may affect not only the persons that were immediately the parties to that suit; but your Lordships see many connections arise upon marriage, many relationships and new claims that may be precluded by such a sentence as this. Suppose the Duke of Kingston had had children by his marriage, it would be as much their interest to establish this sentence as it would be of interest of any other to impeach it, and that such rights as these should be determined in a criminal jurisdiction where the parties cannot be heard, I apprehend, is a position that never was yet maintained.

Upon these principles I hope your Lordships will be of opinion that the rule ought to be applied as well to questions that can arise in criminal jurisdictions as in civil ones. That criminal Courts have determined upon these principles there are cases which have been alluded to, and which are, I apprehend, extremely pertinent. One is the case of *The King v. Vincent*, Strange, 481, mentioned to be an indictment for forgery in having forged a will. The reporter says forgery was proved, but the defendant produced a probate under the seal of the Ordinary; and it was held that that was satisfactory proof of the validity of the will. That is a very strong case, but that there is no right to determine upon civil matters in such a way as this, or even to prejudice civil matters, is very clear in that report.

There is another case reported by the same author, Sir John Strange, 703, *The King v. Rhodes*, that came before the King's Bench, when Sir Robert Raymond was the Chief Justice. That was upon an indictment likewise upon a forgery for having forged a will; that will had been proved in the Ecclesiastical Courts. My Lords, it appears by this report that it was not only a probate in the common form, it was when there had been a long litigation in the Ecclesiastical Courts, and when by a decree of the Court of Delegates the will was pronounced for; upon application to the King's Bench for a habeas corpus *ad testificandum*, the Court there decreed not to issue the writ for this reason, because it appeared that there was then existing a direct sentence for the will, and that sentence, if it had been pleaded in bar to going into the question of forgery, I apprehend, would have been allowed to be conclusive evidence; for the Court said it was not fitting to determine the property on an indictment. It likewise appeared that, though there had been a sentence of the Court of the Delegates pronouncing for the will, that yet there had been an appli-

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cation for a commission of review, so that it was within the knowledge of the Court that the cause was in a means of having a revision; but it was understood that the sentence still remained perfectly in force, for your Lordships know perfectly well the difference between an appeal and an application for a commission of review. In case of an appeal the sentence is suspended, but not so on an application for a commission of review. By the statute of Henry VIII. it is provided that the sentence of the delegates shall be final, and no appeal shall be had from them; but it is now indisputable law that the King may by his Royal prerogative, upon a personal application and a special case laid, direct a commission for reviewing the sentence; but there is no appeal, the sentence remains the same, unless the reviewers in their judgment shall think proper to reverse it. In this case it appears that there was then existing a full and direct sentence upon the validity of that will. It was understood, then, that this right had been pleaded by the defendant, and the Chief Justice stopped the proceeding, and did not even grant that motion which was then sent. These two cases, I am told, have been recognised again in that Court in a very late case of a man who was executed for a forgery, one Perry; and I am told the Judge at that trial offered to the prisoner to put off his trial if he had a mind to make use of that plea; but I am told it was not accepted by the prisoner, and the trial went on. But this I am sure, no use can be made of that case to show that the former determinations were at all impeached by it, because at least, if the probate was not insisted on by the defendant, consequently not overruled by the Court, these cases then remain in their full force; and I will ask in what manner they may be said not to be applicable to the principle we are contending for, that in a criminal Court cases of this sort ought not to be gone into? Will it be said that this being a prosecution under a special Act of Parliament, the crime consists in having married two persons, that the marriage must necessarily come under the consideration of that Court which is to determine? And they cannot by the Act of Parliament itself acquire an original jurisdiction to inquire into the right of marriage. Does not it apply exactly as strong to the case I have now alluded to of forging a will? for it is by express Act of Parliament made a felony of death to forge a will; and it may as well be argued from hence that every criminal Court has by that Act acquired an original jurisdiction as to wills. It cannot be argued a moment that a criminal Court has original jurisdiction of marriage. I do not say, when it has not been determined before, but that the Court must necessarily inquire into the fact; but that it cannot originally entertain such a question. Now, there cannot be a case stated wherein a question was between the parties upon the validity of their marriage and upon

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their state of man and wife to show that it can be determined by a criminal Court. If it cannot, I conceive clearly it cannot be said to have original jurisdiction upon the point of fraud and collusion, which for the reason that has been given, it was thought proper to mention, lest it should be made use of upon the other side. It will be said, perhaps, that there are many instances where parties trying to avail themselves of a judgment, or the sentence of another Court, of the adverse parties being allowed to show that those sentences were obtained collusively. This distinction, I conceive, has been made. If any Court ever is permitted to inquire into the question, it must be a Court having concurrent jurisdiction; and then your Lordships will see the question upon very different grounds, because a Court having concurrent jurisdiction has also the opportunities, all the methods of inquiring into the original question. They being competent to determine the original point, it makes no considerable difference whether it comes before them at first or whether it has before been determined by another Court. It will not be contended, I conceive, that a criminal Court has any concurrent jurisdiction with the Ecclesiastical Court; it clearly cannot be so; it can never entertain the abstract question between parties whether they are man and wife or no; the only way it can be taken up is incidentally, and if the authorities are able to show that where an incidental question arises, if it has been determined by a Court having original jurisdiction, it ought to be conclusive, that will apply to the case now before the Court. For these reasons, and for those that have been more weightily argued by the gentlemen who have gone before me, I hope your Lordships will not think proper to recede from the established and legal principles or make a precedent on this occasion; but if whatever has been was upon the strength of former determinations, and if there is good ground in law to say that this sentence ought to be conclusive to the point to which it is now offered, I trust your Lordships will be of opinion that the prosecution ought not to be permitted to go into any evidence.

Dr. WYNNE—Notwithstanding there has been so much and so ably said upon this question, I hope that the duty I owe to the noble person at your Lordship's bar will plead my excuse for offering a few words upon the same side, in support of the sentence of the Ecclesiastical Court, of the effect with a view to which it is now produced before your Lordships.

The Duchess of Kingston is now upon her trial upon an indictment found against her grounded on statute 1 James, cap. 11, for that being the wife of Augustus John Hervey, she married the Duke of Kingston, the said Augustus John Hervey, her former husband, being then alive. The foundation of this whole pro-

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ceeding therefore is a marriage alleged in the indictment to have been had between the Duchess of Kingston, at that time Mrs. Elizabeth Chudleigh, and Mr. Augustus Hervey. That marriage, my Lords, is the only fact that can make any criminality in the present case; and if it shall appear to your Lordships a fact, which has been already inquired into and decided upon, that it has been put in issue in that Court, which alone could properly take cognisance of it, that that Court has pronounced its sentence against the marriage then put in issue, or any matrimonial contract between Mr. Hervey and Mrs. Chudleigh, who were the parties to that suit, and that this sentence still remains in force, it is submitted to your Lordships to be impossible that those who are prosecuting this indictment against Her Grace can be allowed to go into an examination of witnesses upon that marriage, it being a fact now decided by the legal sentence of a proper Court, and consequently not the subject of that kind of evidence which the prosecutors are, we presume, endeavouring to offer to your Lordships upon it, as if it had been a question upon which no sentence had ever been given.

The sentence upon which we rely was passed in the month of February, 1769, and it recites all the proceedings had in that cause prior to the sentence, and which are sufficient, as we apprehend, to found that effect which we contend it ought to have before your Lordships. The sentence recites that a suit had been brought by the Duchess of Kingston against Mr. Hervey for boasting that he was her husband; that Mr. Hervey appeared in that cause; that he admitted and justified the jactitation, and alleged that he was well warranted in making such jactitation, for that he was actually married to the lady. By that means they were at issue upon the fact. The sentence goes on to say that he had entirely failed in the proof of the marriage, which he had pleaded and propounded, in consequence of which the Court pronounces Mrs. Chudleigh to be entirely free from all matrimonial contract, and particularly with the said Mr. Hervey, so far as to us as yet appears, and upon that goes on to admonish him to cease from further jactitating in that behalf. The question now for your Lordships' consideration, therefore, is, what is the effect of that sentence? and I contend that, in the way in which this cause was proceeded in, it is as decisive, as absolute, a sentence against the marriage as the Ecclesiastical Court has power to give.

If the party who is accused in such a suit does not justify the jactitation by pleading a marriage, it is otherwise; for in that case, whether the fact of jactitation is admitted or denied, the sentence is only upon the jactitation, not upon the marriage. If the jactitation is admitted, and is not justified, the party is admonished to do so no more; if the jactitation is denied, the only question before the Court is, did the party jactitate or not?

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and if the jactitation is proved, the sentence is the same, viz., a monition to cease from doing so for the future. But if the party cited confesses the jactitation, and justifies it by pleading that he or she was and is actually and lawfully married to the other party who has brought the suit, it is no longer a cause of jactitation, it is as much and as directly a marriage cause as a cause of nullity of marriage, or a cause for restitution of conjugal rights. It is as absolute and decisive proof of this, in my humble apprehension, that if the party cited in a cause of jactitation pleads and proves a marriage, the Court does not in that case dismiss and say the party it is true jactitated, and had a ground for jactitating; therefore we dismiss. No, the Court pronounces for the marriage. And I take it to be most clear that such a sentence having been pronounced in any Ecclesiastical Court, if the party cited should immediately pray restitution of conjugal rights, the Court will grant its monition grounded upon that sentence, that the parties who were proved to have been lawfully married should cohabit and perform the duties of their marriage. It will not, I presume, be contended that any Court can deal so very unequal a measure of justice between parties as to say if a marriage is proved we will pronounce for it; And yet in a cause of exactly the same nature, if a party pleads a marriage, and fails in the proof of it, we will not pronounce against it. The supposition is absurd and shocking to common sense, and it is impossible that such a cause as a cause of jactitation could ever have been in use if the party who brought it might lose his cause and be engaged in a marriage he was desirous to avoid, but could never obtain any sentence against the party jactitating, that would have any legal effect. It is impossible, with great deference to your Lordships, that such doctrine should ever have obtained; but the truth is directly the reverse, and in all Courts where these sentences against a marriage in a cause of jactitation have been produced, they have been allowed to be as decisive as any sentence in an Ecclesiastical Court in a marriage cause could be. In the case of *Jones v. Bow*, reported in Carthew, it is expressly said that it was a cause of jactitation. In the case of *Clewes v. Bathurst*, which has been mentioned to your Lordships, it was a cause of jactitation; and I rather rely upon that case, because it appears by the report of it in the book entitled "Cases in Lord Hardwicke's Time," p. 11, Hil., 7 Geo. II., that it was attended by as able a civilian* as any of his time, Dr. Lee, afterwards Dean of the Arches.† He argued in that cause that a sentence against a marriage in a cause of jactitation is an absolute and decisive sentence. And it appears from the report that he quoted another case, which was that of *Millisent v. Millisent*, in which it had been so held in the Court of Delegates, which your Lordships know is a Court of appeal in ecclesiastical

* probably a Civil Law ~~scholar~~ who was called a civilian
Canon Law ~~scholar~~ who was called a canonist
Judge of the Court of Delegates

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causes, in which there are both Judges of the common law and civilians. The case which was last alluded to, and which was in the Prerogative Court, your Lordships will allow me to state a little more fully, because it will show the opinion of the great Judge who now presides in that Court. It was upon the right of administration to one Mrs. Gertrude Brown. The question was between Stephen Brown, who alleged himself to be the husband, and the Lady Viscountess Mayo, the daughter of the deceased by a former husband. The marriage between Brown and Mrs. Aylemore, which was the deceased's former name, was not denied; but Lady Mayo insisted that at the time of the marriage with Mrs. Aylemore Mr. Brown had another wife at that time living, whose name was Eleanor Cutts. Mr. Brown to that replied that he had brought a cause of jactitation in the Consistory Court of London against Mrs. Eleanor Cutts, and that sentence had been pronounced exactly as in the present case, and that he was free of all matrimonial contracts with said Elizabeth Cutts. Lady Mayo then offered an allegation, in which she pleaded that the sentence in such cause of jactitation had been obtained by collusion, and annexed to that allegation she exhibited many letters between Stephen Brown and Elizabeth Cutts, by which it appeared that after the date of the sentence they had corresponded together; that he had acknowledged himself to be her husband in several of these letters, but told her it would be exceedingly inconvenient to his affairs, and entirely destroy his claim to the administration of Mrs. Aylemore, which was of some considerable value to him, if his marriage with Mrs. Cutts was known, and therefore desired her to be silent and not give him any further trouble; that was the effect of Lady Mayo's allegation. The moment that allegation was brought into Court the proctor for Brown desired that the proctor for Lady Mayo might be asked whether he confessed or denied the subscription of the officer who authenticated the copy of the sentence given in the cause of jactitation, which being confessed, and the sentence by that means regularly proved, the Judge said he could go no further; he could not inquire upon what grounds that sentence was given, but would give a time to the party, if she thought it for her interest, to apply to the Consistory Court of London, and see whether that sentence could be reversed; but it was held that so long as it remained in force it was decisive upon the question of the marriage and absolutely binding upon the Judge of the Prerogative Court.

This being the case, then, the question for your Lordships' consideration now is, what effect the sentence given in the Consistory Court of London in 1769, in the cause of jactitation of marriage brought by the Duchess of Kingston, then Mrs. Elizabeth Chudleigh, against Mr. Hervey, should have in the present cause before your Lordships? My Lords, it would be a very

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unpardonable waste of your Lordships' time at this hour of the day for me to take up a moment of it in arguing that marriage is by the law and constitution of this country of ecclesiastical cognisance. There cannot be a doubt that, if there be any impediment to the marriage of two people living together as man and wife, that if one of the parties denies either the fact or validity of the marriage, that if one of the parties refuses to perform the duties of it by cohabitation, that if one of the parties treats the other with intolerable severity, that if a person boasts of a marriage which he cannot justify, or if some kind of contract or solemnity passed between parties which may occasion a doubt whether it amounts to a lawful marriage or not, in every one of these cases the Ecclesiastical Court has cognisance to decide upon the questions that arise, and it is a denial of justice to refuse it, and would be a just ground of appeal to a superior Court.

It is true that in some cases where a marriage is brought not directly, but collaterally and consequentially in question, as where it is a question of legitimacy in order to make a title to an inheritance, it may originally commence in the temporal Courts, and sometimes is finally determined there, as in the case of what is by common law called special bastardy, that is, where there is no doubt about the marriage, but about the priority or posteriority of the birth of the party who is claiming the inheritance to that marriage; there, it being a mere matter of fact whether the person was born before marriage or after, it is proper for the jury to determine, and there is no need of the interposition of the Ecclesiastical Court at all. So in other cases where the matter begins as a question upon an inheritance. A person makes a claim to an inheritance as being the lawful son of A and B; if the parties to the marriage or one of them be dead, the application must be made originally in this case to the temporal Courts, and they will proceed in it, and will either determine it finally or direct a case to the Ordinary to certify upon the marriage, according as they find it necessary to do, and according as any question arises upon the legality of the marriage or not. But even in this case, which is merely a question upon a right to an inheritance, and not between parties to a marriage, but between parties claiming under a marriage, if one of them produces a sentence formerly given upon the marriage by the Ecclesiastical Court in the lifetime of the parties to such marriage, the moment that sentence is produced the Court of common law is estopped; and, notwithstanding the original parties to that sentence are dead, the parties to the suit upon the inheritance must still have recourse to the Ecclesiastical Court to repeal the sentence formerly given upon the marriage before the temporal Court can proceed a step further. And if this sentence of the Ecclesiastical Court is not set aside, the judgment of the temporal Court must be agreeable to that sentence. The cases of *Bunting*

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and *Leppingwell*, and *Kenn's* case, reported by Lord Coke, are decisive upon this point. And it would, I should conceive, in framing your opinion upon the credit due to the doctrine laid down in these cases, be worth one moment's consideration at what time the latest of them was determined. *Kenn's* case was in 5 King James I. Your Lordships know extremely well that was a time when the different jurisdictions of the temporal and Ecclesiastical Courts were not so completely settled, or at least that settlement was not so completely acquiesced in on the part of the Ecclesiastical Courts then as it has been since. They did frequently desire to arrogate to themselves more jurisdiction than the temporal Courts were willing to allow, and the consequence of that was they were very frequently withstood. This produced a complaint to the Privy Council in 3 King James I., when Archbishop Bancroft, in the name of the whole clergy, exhibited a set of articles against the Judges of the realm (as Lord Coke expresses it, 2nd Inst. 601) entitled, "Certain Articles of Abuses which are desired to be reformed in granting Prohibitions." These articles were delivered to the Judges, who in 4 King James made their reply to them, in which they justified the proceedings objected to by the Archbishop in every particular, and that not without some considerable degree of warmth and resentment. Now, with great deference to your Lordships, I should conceive that a resolution solemnly and unanimously made by the two Chief Justices and five other Judges of the common law in the very next year, after such a dispute as this had been carried on between the two jurisdictions, cannot well be suspected of partiality to the Ecclesiastical Court. And Lord Chief Justice Coke, who was one of the Court, was not a Judge that would at any time have stood up for their encroachments; and therefore there is not the least room to apprehend that there was any undue or improper degree of authority attributed by that resolution of the Judges to sentences of the Ecclesiastical Courts.

This case of *Kenn*, which is reported 7 Coke, 43, has been already opened to your Lordships; but it being in my apprehension extremely material in this cause, containing the whole learning that is to be met with in the book upon the subject, and going the whole length, as I humbly submit to your Lordships it does, that it is our business to contend for in behalf of the noble person at the bar, your Lordships will not perhaps think it misspent time in me to state it more particularly. It was a case in the Court of Wards, in which Thomas Robertson and Elizabeth, his wife, were plaintiffs, and Florence Lady Stallenge defendant. The case was that Christopher Kenn *de facto* took to wife Elizabeth Stowell, and had issue by her, Martha; soon after this there appears to have been a suit brought in the Court of Audience, in which the judgment given was in these words—*Prætensum contractum et*

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matrimonium inter Chr. Kenn et Eliz. Stowell in minore ætate eorundem aut eorum alterius habitum fuisse. Eisdemque Chr. et Eliz. tam tempore solemnisationis dicti matrimonii quam etiam continuo postea, eidem matrimonio dissensisse, ac eo prætextu hujusmodi matrimonium irritum et invalidum fuisse. Necnon antedictos Chr. Kenn et Eliz. Stowell ab dicto matrimonio separandos et divorciandos fore pronunciamus, eosque separamus et divorciamus, iisdemque Chr. et Eliz. libertatem ad alia vota convolandi concedimus per hanc sententiam nostram definitivam.

After this Kenn married another wife, Elizabeth Beckwith, and after this it appears that Elizabeth Beckwith brought a suit before the commissioners ecclesiastical to inquire again into the validity of the marriage between Christopher Kenn and Elizabeth Stowell. There that marriage was again pronounced against, and the marriage of Christopher Kenn with Elizabeth Beckwith was affirmed; then Elizabeth Beckwith died, and Christopher Kenn married Florence, by whom he had issue, Elizabeth, and then died. At last the question came on between the issue of Christopher Kenn by Florence, and Martha, the issue of said Christopher Kenn by his first wife, Elizabeth Stowell, who desired she might be permitted to aver against the sentence formerly given against the marriage between Christopher Kenn and Elizabeth Stowell, declaring that she could prove that the whole was founded on an absolute falsehood, and that those parties who are declared by the sentence of the Ecclesiastical Court to have been married in their minority, and to have dissented to the marriage in the moment it was solemnised, and ever after, had cohabited as husband and wife for ten years, and had issue Martha, the party before the Court. This the said party averred and undertook to prove in the Court of Wards, in order to avoid the effect of the sentence of the Ecclesiastical Court against the marriage between her father and mother. But it was resolved by all the Justices and Barons that the said sentence should conclude as long as it remained in force. And in answer to the averment that the sentence was founded upon false facts, they said that, though the Ecclesiastical Judge showeth the cause of his sentence, yet forasmuch as he is Judge of the original matter, the loyalty of matrimony, we shall never examine the cause, whether it were true or not; for of things, the cognisance whereof belongeth to the Ecclesiastical Court, we must give credit to their sentences as they give to the judgments in our Courts. In that same case it was that Lord Coke quoted the case of *Corbett*, and there had been no sentence in the Ecclesiastical Court; that originally began upon the question of a right to an inheritance, and the party who claimed the inheritance was advised to bring a suit in the Ecclesiastical Court then against a woman who jactitated, as he said, of an undue marriage with his elder brother. The party against whom this suit was

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brought in the Ecclesiastical Court applied for a prohibition, and the temporal Court granted it; for they said there is no sentence of the Ecclesiastical Court in this case for you to reverse, no sentence has been given; therefore we will inquire, as far as we see we can do without interfering in matters of mere ecclesiastical cognisance respecting the loyalty of the marriage, and we may direct the Ordinary to certify hereafter if there is necessity for it, but there is no need to apply to the Ecclesiastical Court in the present state of the case.

In exact conformity to this principle it was resolved by the Judges of the common law in the case of *Bunting v. Leppingwell*, 4th Coke, 29, forasmuch as the cognisance of the right of marriage doth belong to the Ecclesiastical Court, and the same Court hath given sentence in this case, the Judges of our law ought (although it be against the reason of our law) to give faith and credit to their proceedings and sentences, and so always have the Judges of our law done. And so it was resolved that the plaintiff was legitimate and no bastard.

This is the light in which the sentences of the Ecclesiastical Courts, given in matters properly within their cognisance, were considered in the Courts of common law at the time when the cases I have just referred to were determined; and there is such a train of cases exactly conformable to them down to very modern times which have been already quoted, and therefore I will not trouble your Lordships with repeating them, that I cannot help thinking it must be looked upon as a point absolutely settled and at rest.

But, my Lords, not to rest the matter merely upon authority, however strong, if your Lordships consider the grounds upon which these determinations were made, I apprehend they will be founded, not only in justice, but in absolute necessity, and that the confusion would have been so infinitely great, if, admitting different Courts to take cognisance of different matters, their sentences should not be allowed to take effect when they were given, but the matter might be examined over again, and a different sentence given in another Court, the former sentence remaining unrepealed, that there would be no possibility of enduring such a practice. Consider for a moment what effect it would have. Suppose a man to have brought a suit for jactitation of marriage against a woman in the proper Ecclesiastical Court; that she should plead her marriage by way of justification, and obtain a sentence for it; the man dies intestate after that, and she applies to the Prerogative Court for an administration as the widow. The next-of-kin of the deceased appears there, and denies her to be the lawful widow, in proof of which she produces the sentence. Is the Prerogative Court to give credit to this sentence or not? If it is to give credit to it (as it does daily) the reason is because it binds

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universally as long as it is in force, for, though they are both Ecclesiastical Courts, there is no more privy between the Prerogative Court and the Consistory Court of any diocese than between the Prerogative and the Court of King's Bench. The Prerogative Court has the mere cognisance over probate and administration; and therefore, if universal credit is not due to the sentence of the Court which pronounced for the validity of the marriage, the Prerogative Court must in the case supposed go into the question over again, whether the party deceased and the party claiming to be his widow were married or not married. The Prerogative Court is an Ecclesiastical Court, and proceeds upon the same rules, so far as they are applicable; it proceeds in the same manner by allegation and by written evidence; the Judge is a person bred in the same profession; and the practisers are the same with those that practise in the Consistory Court of London; and therefore there is a probability that the Prerogative Court in this case might agree with the Judge of the Consistory in opinion that the marriage was a good one, and consequently decree the administration to the party praying it as the widow. What would be the consequence of that? Why, the party would have had two law suits instead of one, and have got by them two pieces of paper called sentences, for her marriage and letters of administration, but she would not be a bit the nearer getting possession of the deceased's effects; for these she must apply to a Court of common law; and there, according to this doctrine, the first person she is obliged to bring an action against will be at liberty to say, who are you? the administratrix and widow. No, I deny that. It is true you have obtained a sentence for your marriage and an administration from the Prerogative Court as the widow; but those sentences were founded upon false facts; therefore I object to them, and desire there may be a third suit, to have it inquired into in this Court whether there was a real marriage or not. Now, supposing that in this third suit a jury should be of a different opinion from the two former Courts, what would be the consequence? Why, that the party who brought a suit for a debt would be non-suited. So that here would be a legal administration subsisting (unless the Court in which the action was brought could repeal it and grant a new one, a power which I believe no temporal Court has ever yet exercised), but the hands of the administrator would be absolutely tied up, the effects could never be administered, the debts of the testator could never be called in, the estate could never be distributed. Your Lordships see plainly that the confusion would be so extreme, if this doctrine was to prevail, that no error in a sentence, however apparent, nor any inconvenience arising from it to particular persons, however great, can be a sufficient cause for any Court to examine into the merits of a sentence given in a matter of which itself has no legal cog-

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nisance; and that there is the utmost wisdom in those resolutions which declare that there is an implicit credit due from all other Courts to the sentences of Courts having the proper jurisdiction over the matter in which the sentence has been pronounced.

The cases that I have hitherto mentioned and alluded to have been all in civil causes. Will it be said that the question now before your Lordships, being in a criminal cause, that varies the case; and that, although a sentence of the Ecclesiastical Court would be binding and conclusive evidence in a civil cause, yet in a criminal cause it would not have the same effect? My Lords, the same effect I can very readily agree that, according to my poor notions of law and justice, it would not have; but I should think it would have ten times greater; and I cannot conceive it possible that it can be held in any case, or in any country in the world, that a sentence which would be held to be conclusive evidence to avoid a civil demand against a person, would not be held to be conclusive evidence and defence against a criminal prosecution. I cannot conceive that to be possible. *In pœalibus causis benignius interpretandum est* is a maxim of universal law. Undoubtedly it is the business of all criminal judicatures to inquire strictly into crimes, to punish those acts which the law has made criminal, and which are legally proved; but Courts of law do not strain points in order to make crimes and inflict punishments; it never was so contended. And I do conceive that many instances might be enumerated by those who are conversant in the practice of the criminal law, which I am not in the least, in which parties prosecuted are indulged with peculiar privileges; I believe that they are not bound by their first plea. If a party has been ill advised in his plea, he is bound down by that in a civil cause; but in criminal prosecutions the prisoner may plead over and over again, and is allowed to avail himself of every nicety in the law to avoid conviction.

Upon these grounds, therefore, I hope it will appear to your Lordships to be most clear that the sentence of the Ecclesiastical Court always has been esteemed and must be allowed to be final, to be the only evidence that can be received concerning the fact upon which it has been pronounced, and that the fact is no longer the legal object of inquiry by any other Court. I do apprehend this to be so clearly and fully established that I can scarce conceive that the gentlemen will deny it; but I apprehend and do expect that they will endeavour to find a distinction; and they will say, though we should admit your rule, that the sentence of an Ecclesiastical Court is binding so long as it subsists in general, yet if that sentence was obtained by collusion and fraud, it is otherwise; and if it can be proved to have been so obtained it will immediately lose its effect. I expect we shall be so told; and I do admit that to maintain our present point, which is that the

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sentence is conclusive evidence, we must say that it is a rule without any exception; we must say that collusion in obtaining the sentence would not give your Lordships any jurisdiction to inquire into the fact. And I do, with great submission, contend before your Lordships that no Court which has not an absolute and an entire jurisdiction over a fact, as much as the former Court had, can take cognisance of a matter that has been already decided upon in that former Court upon a suggestion or even proof that collusion was used in obtaining the former sentence. I may, and I am afraid I shall, talk very ignorantly respecting those cases in which the Courts of common law take cognisance of matters which have been already decided upon by other Courts, upon proof that the decision was obtained by fraud and collusion of the parties at that time before the Court. I own I am by no means master of that subject; but I apprehend they are only in such cases where each Court suppose the Court of King's Bench and Common Pleas or any other has an entire concurrence of jurisdiction, where there was an option in the parties to commence the suit originally either in one Court or the other, and where the effect of the sentence of the two Courts would be perfectly equal. In such a case, if after sentence given in one of those Courts application should be made to the other to rehear the matter, on proof that the former decision was not fairly obtained, this might be a just ground for the Court to which proof of the fraud is offered to say we will hear the matter over again, which we had a right to have heard as well as the other Court had, had it not been that the cause was commenced with them. But I apprehend no Court can do this, the sentence of which, when it is given, will not have the same legal effect to the full as the sentence of the former Court. Nor can it be said that this Court, high and august as it is, or any other Court of criminal jurisdiction, can give a sentence upon a marriage which will have all the effects that the sentence of the Ecclesiastical Court will have. Strip the question of its circumstances and let it be asked simply, has the House of Lords a power to try the validity of a marriage? Everybody will say at once it has not. Allow me to consider what would be the consequence if your Lordships were to take cognisance of this matter, and were, notwithstanding the sentence of the Ecclesiastical Court, upon the suggestion of collusion or any other suggestion, to say we are not barred by it, we will go into it; and that the party tried under such circumstances should be convicted of polygamy, what would be the consequence of that? Would it set aside the second marriage? I take it most clearly it would not. Suppose that after the wife had been convicted of polygamy for marrying B in the lifetime of A, her former husband (a sentence against her marriage with A having first been obtained in the Ecclesiastical Court), she

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should by any means become entitled to a fortune, by legitimacy or otherwise, would not B have a right to demand the legacy or any other effects that came to the woman subsequent to the conviction? I submit to your Lordships he certainly would. Suppose B to die intestate, might not the wife, notwithstanding such a conviction as this, pray the administration to his effects? And if her interest as widow was denied, as having been the wife of A at the time she married B, and she in reply to this should produce the sentence in the Ecclesiastical Court against her marriage with A, bearing date prior to her marriage with B, the Court could not refuse to grant administration to her. Suppose that after the conviction the parties to the second marriage should continue to cohabit, and should have children, would not they be entitled to the inheritance as the legitimate issue of the second marriage? I take it that, under the authority of the cases of *Bunting v. Leppingwell*, *Kenn*, and the rest that have been since determined conformably to those cases, there cannot be a doubt that they would, if a question should arise upon the right to the inheritance in a Court of common law, so long as the ecclesiastical sentence against the first marriage remained in force. In short, the conviction would have no operation at all upon any civil effect of the second marriage. The consequence, therefore, of proceeding to convict for polygamy for a second marriage in a case where there had been a sentence of the proper Ecclesiastical Court against the first would be that a woman who had been convicted of felony for marrying might under that criminal act (as it would then be pronounced to be) derive to herself all the privileges and advantages that accrue to a wife in the fortune of her husband by a lawful marriage, and convey a title to her issue to the greatest honours and estate in the Kingdom. These are such glaring contradictions and absurdities as I should with great deference apprehend that neither your Lordships nor any other Court of justice would give occasion to without the utmost reluctance. There is a case or two which have not yet been mentioned, and which appear to me to be extremely material, to show the extraordinary and unusual steps that have been sometimes taken by Courts, and in cases extremely similar to the present, to avoid a contrariety of sentences of Courts having different and distinct jurisdiction. In the case of *Boyle v. Boyle*, in the King's Bench in 1687, reported 3rd Mod. 164, A libel was admitted in the spiritual Court against a woman *causa jactitationis maritagi*, the woman prayed a prohibition to the Ecclesiastical Court, and the suggestion was that this person, who now libelled against her in a cause of jactitation, had been indicted at the sessions in the Old Bailey for marrying her, he having a wife then living; that he was thereupon convicted, and had judgment to be burnt in the hand; that, therefore, they had no right

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to proceed, and therefore a prohibition was prayed. Serjeant Levintz in that case moved for a consultation, because no Court but the Ecclesiastical Court can examine the marriage. Upon the contrary it was said that if a prohibition should not go, then the authority of these two Courts would interfere, which might be a thing of ill consequence. That if the lawfulness of this marriage had been first tried in the Court Christian, the other Court at the Old Bailey would have given credit to their sentence, and upon this ground and this principle merely that there might be a contrariety of sentences, which would be mischievous. The Court went certainly a great way, for it prohibited the Ecclesiastical Court from proceeding in a marriage cause *inter vivos*, of which it has the clearest and most uncontroverted jurisdiction.

Another case was that of *Fursman v. Fursman*, which began in the Consistory Court of Exeter. It was a cause of restitution of conjugal rights brought by the woman; the libel was admitted; and then there was an appeal to the Court of Arches; the Judge pronounced for the appeal, and was proceeding upon the merits of the cause; but upon 4th November, 1727, he was served with a prohibition, and the ground for obtaining this prohibition was that Sarah Fursman, pretending to be the lawful wife of the said Fursman, had indicted him for bigamy in marrying another wife, and failed in proof of her own marriage, whereupon the said Fursman was acquitted; and therefore it was said the Ecclesiastical Court should not proceed. Now, my Lords, if a prior judgment given by a Court in a matter in which it can have only an incidental partial jurisdiction is a sufficient cause for stopping all subsequent proceeding in the same case, even in the Court which has the entire ordinary jurisdiction over the question, on account of the ill consequence that would ensue from the interference of the authority of the two Courts, surely, by all parity of reasoning, in a case where it appears that the Court, which the law and constitution have entrusted with the entire jurisdiction over the matter in question, has already taken cognisance of it and pronounced its sentence, the Court of incidental jurisdiction will give credit to such sentence, and confirm its own sentence to it.

If the ill consequences arising from clashing and contradictory judgments of different Courts may be allowed to have any influence upon your Lordships' judgment in this matter, there is no need to rack the invention for circumstances that might happen; the case before your Lordships need but be plainly stated to show those inconveniences in the strongest light. The sentence of the Ecclesiastical Court pronouncing and declaring the noble prisoner to be free from all matrimonial contracts with Mr. Hervey was given in February, 1769. Soon after she married the Duke of Kingston under the dispensation that is usually granted for the marriage of persons of that rank. Under this marriage the Duke

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and Duchess cohabited between four and five years as husband and wife, at the expiration of which the Duke of Kingston died, having first made his will, by which he gave the most affectionate and most honourable testimony of considering her as his wife. At last in July, 1775, comes a bill of indictment, which is to set the sentence of the Ecclesiastical Court entirely at nought, and to brand this open and solemn marriage, confirmed by a cohabitation and reputation of so many years, with the name of a felony.

If this indictment should be proceeded upon, and the fact of the first marriage found differently from what appeared to the Chancellor of London at the time of pronouncing his sentence upon it, the confusion, the scandal (I think I may venture to call it) that would arise from the contrariety of the two sentences that would then be pronounced, and both still in force, would be such that I cannot conceive that any Court of justice would hazard it, upon any suggestion or apprehension of error in the former sentence, or fraud in obtaining it, and which was irremediable by any other means, or any other the most striking or plausible argument that could be urged to induce them to it. But the plea of the necessity of doing an extraordinary act to set aside an improper sentence, or the effect of such a sentence, is certainly less applicable to the Ecclesiastical Court than to any other Court known in this kingdom, and least of all is it applicable to their proceedings in marriage causes. There is a Court of Appeal in the Ecclesiastical Courts, a deliberation in their proceedings, that is unknown to any Court in this kingdom; from the Archidiaconal Court (if the cause be originally instituted there) to the Consistory of the diocese; from thence to the Metropolitan Court, which is the Court of Arches; from thence to the King in his Court of Chancery, from which a commission of delegates to hear appeals issues *ex debito justitiæ*. In every one of these Courts the parties are not bound down to what has been given in evidence in the Court below. It is not merely error in law, but error in fact likewise, may be corrected on appeal in the Ecclesiastical Court; and if there are any facts material to the point in issue that have not been pleaded and examined to in the inferior Court they may be pleaded and given in evidence in the Court of Appeal, and so down to the last Court. Besides this, in every one of these Courts it is not a matter confined to the two parties that institute the suit, and therefore may carry it on collusively, for in any period of the cause a third person that has any interest in the matter in question, if he sees that the two original parties are colluding, or that one of them is negligent, or if he has any other reason to be dissatisfied with the manner in which the business is conducted, he may intervene for his interest, and the Court must *ex debito justitiæ* admit him to do so; he may give in a plea, if he intervenes before the cause is concluded; he may examine his own wit-

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nesses and act in all respects as a party in the cause. What possible human means of providing against collusion and surprise is omitted out of this method of proceeding! But, my Lords, even this is not all, for when the cause has run this great length, application may be made to His Majesty in Council, who, if he is advised that there is a ground for it, has a power *ex gratia* to grant a commission to review the whole matter over again. From this view of the method of proceeding in Ecclesiastical Courts I apprehend it will appear to your Lordships that they are not so ill provided with means either to avoid or to reform errors in their judgments as to stand in need of the extraordinary interposition of other Courts in any matters that are properly within their jurisdiction; but least of all is this necessary in a marriage cause, for a marriage cause is never at an end. Let the cause have been argued ever so often, let it have been sisted with the most scrupulous exactness and attention, let there have been one or more appeals, let every step have been taken that can be taken to give a final and conclusive judgment, still the same party may come before the Court and say the Court has been imposed upon; I desire this matter may be examined over again. The Court, upon such application, would and must take cognisance of it.

I will trouble your Lordships with quoting but one authority for this, which is that of Sanchez in his "Treatise de Matrimonio," Lib. 7, Disp. 100, C. 1., who lays it down in these positive and explicit terms—" *Id in matrimonio speciale est, ut sententia in conjugali causa lata, quacunq[ue] circumspectione præmissa, sive bis ab ea provocatum fuerit confirmataque sit, sive lapsus terminus ad appellandum sit, nunquam transeat in rem judicatam, ac proinde non ita efficacem auctoritatem sortiatur, quin retractanda sit, quoties compertum fuerit eam errore quodam latam fuisse.*" And the reason assigned for making this material and singular distinction between marriage causes and all other causes is, that in general the consent of the party who does not appeal from a sentence which is given against him gives force and authority to the sentence, though there might otherwise be a ground for him to complain of it. But, says the author before quoted, "*Sententia per errorem lata in causa conjugali, transiens in rem judicatam, foveret peccatum, separando veros conjuges, vel uniendo eos qui tales esse nequent. At nullum vinculum quantulumcunq[ue] multiplicatum, potest firmare actum ex quo peccatum consurgit.*"

The same doctrine is laid down in a multitude of other writers upon the canon law, of which there are wagon loads; but they are unanimous in establishing the maxim, "*Sententiam in causa matrimoniali nunquam transiere in rem judicatam,*" which I am sure your Lordships will not hear denied or disputed by the other side.

From hence it will appear to your Lordships how little ground

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there is for that notion which seems to have got abroad that the proceedings of the Ecclesiastical Courts in causes of jactitation, or any other causes, are such as tend to loosen the bonds of matrimony (which both in a civil and religious light without doubt is the most essential bond of society) and give parties an opportunity of dissolving it at their pleasure. The Court in these, as in all other cases, must determine *secundum allegata et probata*, according to the evidence before it. But where is the encouragement given to parties to collude, or what security can they have under a sentence obtained by fraud, when that fraud may at any future time be detected by bringing forward that evidence which was before withheld, and upon proof that the former sentence was erroneous, another of a direct contrary tendency will be given?

My Lords, the marriage, which is the only fact in dispute in the present case, has many years ago been put in issue in the proper manner in the proper Court, and a sentence given against it as decisive as any that Court can give in a marriage cause. Upon trust and confidence in that sentence it was that the act was done for which the noble prisoner is now accused before your Lordships; the sentence is produced, remaining in full force; and for the reasons that have been urged we humbly hope your Lordships will be of opinion that it is the only legal evidence that can now be given respecting the fact upon which the accusation is founded, and that your Lordships will therefore receive it in bar of any other.

Then the Lord High Steward returned back to the chair.

LORD PRESIDENT OF THE COUNCIL—My Lords, I move your Lordships to adjourn to the Chamber of Parliament.

LORDS—Ay, ay.

LORD HIGH STEWARD—This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same order they came down, except the Lord High Steward, who walked after His Royal Highness the Duke of Cumberland, and, the House being thus resumed, resolved to proceed further in the trial of Elizabeth Duchess Dowager of Kingston, in Westminster Hall, to-morrow at ten of the clock in the morning.

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Second Day—Tuesday, 16th April, 1776.

The ATTORNEY-GENERAL—My Lords, I find myself engaged in a very singular debate upon a point perfectly new in experience, analogous to no known rule of proceeding in similar cases, founded on no principle, none at least which has been stated. The prisoner, being arraigned upon an indictment for felony, pleaded not guilty, upon which issue was joined. In this state of the business she hath moved your Lordships that no evidence shall be given or stated to prove that guilt upon her, which she hath denied and put in issue. The only case cited in support of so extraordinary a motion, that of *Jones v. Bow*, Carth. 225, bears no relation or proportion to it. In the trial of an ejection the defendant, admitting the plaintiff's title to be otherwise clear, avoided it by a sentence against the pretended matrimony of his mother with Sir Robert Carr, after which both parties married with other persons; a sentence, unimpeached in form or substance, against his own mother, from whom he was to derive title to his state; decisive consequently as a fine with non-claim, or any other perfect bar; and submitted to accordingly, for the plaintiff was called and did not appear. Here, if the sentence should ever come properly under examination, it will appear to differ in all those respects.

In the meantime, instead of defending, this motion is only putting questions to your Lordships hypothetically for opinion and advice how to order the defence. If this sentence be, as they argue it, a definitive and preclusive objection to all inquiry, the prisoner ought to have pleaded it in bar, and to have put the prosecutor upon dealing with her plea as he should be advised; or she may still rely upon it in evidence of not guilty. But without placing any such confidence in it themselves, they call upon your Lordships to make it the foundation of an order to stop the trial.

To say that this is wholly unprecedented goes a great way to conclude against it. To say that such a rule would be inconsistent with the plea, and repugnant to the record as it now stands, seems decisive. After putting herself for trial upon God and your Lordships, she beseeches you not to hear her tried. But I shall not content myself with this answer; because, as your Lordships have thought proper to hear counsel in support of this extraordinary motion, I am bound to suppose it a fit subject for argument, and to lay before your Lordships my thoughts upon it as they occur.

Before I go into particular topics I cannot help observing with some astonishment the general ground which is given us to

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debate upon. Every species and colour of guilt within the compass of the indictment is necessarily admitted. So much more prudent it is thought to leave the worst to be imagined than even to hear the actual state of her offence. Your Lordships will therefore take the crime to be proved in the broadest extent of it, with every base and hateful aggravation it may admit, the first marriage solemnly celebrated, perfectly consummated; the second wickedly brought about by practising a concerted fraud upon a Court of justice to obtain a collusive sentence against the first—a circumstance of great aggravation. When Farr and Chadwick defended a burglarious breaking and entering, under a pretence of an execution, upon a judgment fraudulently obtained against the casual ejector, it was thought to aggravate their crime, and they suffered accordingly. I allude to the case in Kelyng, 43.

I take the ground so given me with this reserve, not that I wish to have her crime implied from the conduct she is advised to hold here to all purposes and conclusions, but that the necessity of the argument obliges me to assume it, as plainly and distinctly confessed, while this sentence is urged as an irrefragable bar to the trial, whatever may be the degree of her guilt, however such a sentence may have been obtained, and whether it tends to aggravate that guilt or to extenuate it. The proposition looks so enormous that it requires great abilities to give it any countenance and the most irrefragable argument to force the conclusion.

I must also remind your Lordships again that the sentence has been read in this stage of the proceeding, by the consent of the prosecutor, and under the express reservation of his right to object to the competence of it, as evidence on the issue joined, unless he should think fit to make it part of his own case. At present it stands admitted merely as the ground of this previous motion. The sentence, being collusive, is a nullity. If fair, it could not be admitted against the King, who was no party to the suit. If admitted, it could not conclude in this sort of suit, which puts both marriages in issue. The objections arise from the general nature of the sentence propounded, which is never final; from the parties, who could not by their act bind any but themselves, or those who are represented by them, or at most those who might have intervened in the suit; from the nature of the present indictment, which puts the marriage directly in issue; from the circumstances peculiar to this sentence, which prove it to be collusive.

Without adverting much to those particulars, the learned counsel for the prisoner affected to lay down a universal proposition, that all sentences of peculiar jurisdictions are not only admissible but conclusive evidence, and referred to many cases, of which I shall controvert nothing but the application.

The case of *Burroughs v. Jemineau*, 2 Str. 733, is nothing to this purpose. That was a supposed contract by accepting a bill

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of exchange at Leghorn, which acceptance was void by the peculiar laws of that country, because the drawer had failed without assets in the hands of the acceptor, and was pronounced to be so by a competent Court in Leghorn. The plaintiff insisted upon it, because, if the acceptance had been made here, it would have bound. But, according to the law of the place where it was made, the acceptance did not constitute a contract. The plaintiff might, if he had been advised otherwise, have defended that suit; he acquiesced in the decision.

Courts of Admiralty sit between nation and nation. They proceed *in rem*, and they bind the property, not only against the apparent possessor, but all the world, or else the very existence of the Court would be subverted. Anybody may claim, and proper monitions issue for that purpose. Therefore, in the case of *Hughes v. Cornelius*, the plaintiff failed in his action of trover, although the verdict found his property, and consequently the sentence of the French Admiralty erroneous, because the Court had no such jurisdiction over that sentence. For the same reason, in *Green v. Waller*, the sentence of the Admiralty could not be gainsaid. There is no appeal but to the sword.

The same principle governs as to seizures in the Exchequer, where any person may come in and claim, which, if they neglect, they tacitly assent to the condemnation. So of seizures tried before the Commissioners of Excise.

So in the case of *Moody v. Thurston*, 1 Str. 481, where an Act of Parliament gave an action (on a certificate of Commissioners that money was due from an agent to officers of the army) the agent could not defend, by controverting the truth of the certificate. It was contrary to the Act, and he might have been heard before the Commissioners.

Where a soldier had complained of his major for undue correction to a court-martial, which dismissed his petition, he could not maintain an action, for he had been heard in a Court competent and final to that purpose.

No temporal remedy lies to recover possession of a benefice forfeited by deprivation while the sentence of a Court competent to declare the forfeiture remains in force. The same rule holds as to derivative claims. Therefore the judgment of Ouster against a mayor is good evidence against the corporator, who claims under him.

Those who enter into collegiate establishments agree to submit themselves to the laws and Magistrates appointed by the founder, and consequently cannot reclaim against them. This was all which was determined in *The King v. New College*, and many other cases which might have been referred to under the same head. In most, if not all, the cases cited the parties had actually been heard before the proper tribunal.

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The office of granting probate and committing administration is a special authority committed to the Ecclesiastical Courts, where all who claim interest may be heard; so there can be no defect of justice. Therefore, in a vast abundance of cases from *Noel v. Wells*, soon after the Restoration, to *Barnsley v. Powell* in Lord Hardwicke's time, the temporal Courts have refused to take cognisance of the right of personal representation. All the cases under this head prove no more.

Cases were also cited to prove that issues joined upon the lawfulness of marriage, profession, general bastardy, and so forth, must be tried by the Bishop, and to infer that his jurisdiction is exclusive; and the statute of 9 Henry VI. c. 11, was cited to prove that it is final not only to parties and privies, but to strangers. The effect of that statute is rather to prove that all the world are, or may be, parties or privies. The only public object of it is to provide sufficient notoriety to make them privy in fact as well as in law. It provides a great variety of proclamations, to the end "that all persons, pretending any interest to object against the party which pretendeth himself to be mulier, may sue to the Ordinary, to whom the writ of certificate is or shall be directed, to make their allegations and objections against the party which pretendeth him to be mulier, as the law of holy Church requireth." For the rest the statute seems to have been an act of violence and fraud by the powerful pretenders against Lady Audley. The mischief they affected to dread could not happen. A certificate is utterly void unless made upon process at the instance of the parties. The certificate of mulierty binds the parties to the suit (as in all reason it ought while such a trial is tolerated), but nobody else. And so it had been often decided before, and yet the statute provided that every such writ and certificate at the suit of Lady Audley should be void. On the other hand, no such issue as profession, bastardy, or lawful matrimony could be tried by the Bishop between strangers; and when tried by the country it bound only those who were parties to the trial and attainit. Nor was an infant bound to answer a plea of general bastardy. But whether the conclusion was too extensive or not in these cases, still it was only in respect to a civil right, and tried by a competent jurisdiction, sitting for the express purpose of deciding upon it, the jurisdiction being created and established by the writ.

Sentences which are given by the Bishop or his official of his own mere authority in matrimonial causes have the least pretence of all others to bind or influence any question which may arise afterwards in judicature. Such causes punish no crime, try no right, proceed to no civil effect. They proceed *pro salute animæ rei* to reform some enormity or neglect in religious life; *in qua* (says *Covarruvias* in his epitome of the Fourth Book

pro salute animæ rei

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of the Decretals, Par. 2, C. 8, S. 12, N. 1) *de maximo Sacramento agendum est*. The process is, *simpliciter, de plano, sine Strepitu et Figurâ Judicii* (Clement, Lib. 2, T. 1, S. 2). From the very nature of such a cause it must follow that the judgment cannot be final. No consent of parties, or omission to appeal, or repeated affirmation of the same judgment, gives it any force. *Quia sententia illa transiens in rem judicatam foveret peccatum, seperando veros conjuges, vel uniendo eos, qui tales esse nequeunt. At nullum vinculum, quantumcunque multiplicatum, potest firmare actum, ex quo peccatum consurgit* (Sanch. de Matrim, Lib. 9, Disputat. 100). In the same disputation Sanchez says, *Potest etiam judex, ex officio, parte invitâ, procedere ad retractandam hujusmodi sententiam; imo ad id teneri judicem probat textus; quia sui interest peccata auferre. Hinc deducitur, certâ regulâ prescribi minime posse, quoties audiendus sit volens prædictam sententiam impugnare*. He illustrates the doctrine by observing that in Costs, which is a civil interest, a matrimonial sentence is binding. *Ratio est aperta: sententia enim matrimonii ideo non transit in rem judicatam, ne foveretur peccatum, sustinendo matrimonium irritum, aut dissolvendo validum; quæ ratio in expensarum condemnatione cessat; et ideo fortitur naturam aliarum sententiarum, quæ in rem judicatam transseunt*. Gaill, in his Observat. 107 and Observat. 112, holds exactly the same language.

The same rule obtains, for the same reasons, in all sentences *pro salute animæ*. A sentence is inconclusive (says Vulteius in his Treatise *de Judiciis*, Lib. 3, C. 12, S. 38) *ex qualitate causæ; puta, quod est matrimonialis, vel alia quæcunque, in quâ animæ periculum versatur*. Scaccia, a very authoritative writer on the effect of sentences, in his book *de Sententia Gloss*, 14, Quest. 2, N. 44, observes as a general rule, *Sententia, in quâ vertitur animæ periculum, nunquam transit in rem judicatam*. The sum of their maxims is given by Oughton, Tit. 205, which is taken almost literally from Consett, and by him extracted from the Books of Practice—"Although, generally, witnesses are not admitted after publication, yet in a matrimonial cause they are, even without oath, that they are come to the knowledge of the parties after publication. And, supposing that sentence has passed against the plaintiff, that he has failed in proof of his libel, and the defendant is acquitted, yet the plaintiff may either in the same cause, or in another, raise a new suit against the same person, not only on a new or second contract, but on the former, and produce proofs known or unknown to him before. And he is not bound by the *exceptio rei judicatæ*, or that the former sentence has passed *in rem judicatam*, because a sentence given in a matrimonial cause never passes *in rem judicatam*, and has many privileges. When the Church is deceived in promulging sentence

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against matrimony, the sentence may be revoked by new proofs, and even by the same, and the reason is to eschew sin and danger to the soul if a wrong sentence should prevail.”

So far as it appears to us it is therefore no idle form of words, but an express reservation of a necessary power to alter the sentence whenever it shall appear to the Bishop that a different rule of life is necessary *pro salute animæ rei*.

The mistake seems to have arisen from considering the Bishop as a Court of civil judicature, and his sentence as pronounced upon the trial of a civil right. In this perverse view, those maxims are absurd and those rules merely vexatious, which, tried by the real nature and end of a matrimonial suit, are founded in piety and zeal for the discipline of religion. In all civil causes the maxim in universal, *expedit reipublicæ, ut finis aliquis sit litium*. In proceedings *pro salute animæ*, the reason of the thing is altogether on the other side.

Even in the moment of stating these sentences to be conclusive, one of the learned counsel could not forbear to give your Lordships a lively representation of the frivolousness of their proceedings and the vanity of their decrees. The doctors have been at the pains to write (says my learned friend) some wagon loads of volumes to prove that these matrimonial causes proceed to no end, and terminate in nothing. All parties, all privies to the suit, all who have interest in the matter of it, may prevent its effect by intervention, by citation to hear the decree reversed by original libel. The sketch was drawn with a great deal of humour, bordering upon ridicule. A vivacity natural enough within the walls of their own college. *Vetus illud Catonis admodum scitum est; qui mirari se aiebat, quod non rideret haruspex, haruspicem cum vidisset*. Yet it seemed rather astonishing that so very judicious an advocate should think this picture of futility the best recommendation of the sentence to your Lordships as an absolute conclusion upon all your proceedings. Here all the world shall be bound by that judgment, which the Court who pronounced it hold for no judgment, and will suffer to bind nobody. But such was the necessity of the argument; to give it any effect they were forced to assume that this sort of sentence is the judgment of a civil judicature upon a civil subject, which is not true; and to give it effect against others than parties they were forced to admit that such others may set it aside, which is true, only because it is no such judgment.

In support of this loose proposition, they cited from our own books several cases in which the temporal Courts suffered themselves to be concluded by such sentences.

If it were necessary or allowable at this day to reason against so many authorities I should incline to think that those cases proceeded upon the mistake I mentioned before, namely, that

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the Ecclesiastical Court try and pronounce upon the civil right of marriage, or ever mean to do so, except when authorised by writ of the King's Courts. But for the purpose of the argument I will suppose that they do; even then the effect of all the cases will amount to no more than this—First, the ecclesiastical jurisdiction has (exclusively) conusance of the right of marriage; secondly, the secular jurisdiction has conusance of the temporal interests which are incident to marriage, and, in order to decide upon them, must try the fact of marriage as part of the question; thirdly, but the judgment of the ecclesiastical jurisdiction on the principal, viz., the right of marriage, wherever it occurs, is final upon the trial of the incident; fourthly, this conclusion extends to all who were parties or privies, or who, in notion of law, have committed laches in not intervening or reclaiming. This I take to be the utmost extent of the cases cited.

The earliest case referred to was *Corbett's*, Fitz. Tit. Consultation Pl. 5. Sir Robert Corbett has issue Roger by his wife Matilda, in whose life he married Letitia, and had issue Robert. Roger sued in the Court Christian to avoid the second marriage, but was prohibited, for that Court had no original jurisdiction. "Otherwise," says Catesby's Justice, "if my father and mother were divorced, married to others, had issue, and died, then I grant well, that I shall have my suit originally in the Court Christian, because I cannot have my action in the temporal law as heir during the divorcè; and also the divorce is a spiritual judgment, which shall be reformed in the spiritual Courts." So it was doubted whether "the brother of a monk, who abandoned his habit and vows, could, as heir, libel to try his brother's profession and hold him to obedience, for he might have his action by the temporal law, and object his profession." But it was agreed "That if the monk had been deraigned for false or unjust cause, the brother might have citation to revoke his deraignment." If this proves the effect which a spiritual sentence upon the principal matter, the right of marriage, or profession, has in cases where these come incidentally into question, it also confines the extent of that effect to those persons who may rescind the principal sentence, and prove the reason of it, namely, that they are not wronged by the conclusion, because they may always be heard against it.

The next case was *Bunting v. Leppingwell*, 4 Co. 29. a. and Moor 169, which was thus found by special verdict. Thomas Twede married, *de facto*, Agnes Adinghall, but under the impediment of a pre-contract between her and John Bunting. Bunting sued in the Court Christian on this pre-contract, obtained sentence for celebration *in facie ecclesiæ*, married her, and had issue two sons, Charles and Robert. Richard, the father of John, gave lands to Robert, for life only. Robert, mistak-

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ing his title, settled them on Emma, his wife, and died. Charles brought an ejectment, as heir to Richard, his grandfather. It was objected that Twede had been no party to the suit in the Court Christian. But Twede might have intervened, or reclaimed, all his life long. So might Emma, if it could have availed her to prove her husband illegitimate, which would have destroyed her title. But Twede had abandoned his pretensions. The sentence was submitted to by Agnes. The marriage was solemnly celebrated, and remained uninterrupted during life. The question was between two issues. It required little argument to sustain the legitimacy.

The next was *Kenn's* case, 7 Co. 68. Cro. Ja. 186. An English bill was brought in the Court of Wards, praying leave to traverse an office, whereby Elizabeth was found the infant heir of Christopher Kenn, and whereupon the wardship had been granted to Florence, the mother of the infant. Christopher Kenn had married Elizabeth Stowell, by whom he had issue Martha, who left issue Elizabeth, the plaintive, his heir at law, if the marriage had stood; but in the first and second of Philip and Mary the Court of Audience pronounced the marriage void for want of age, and gave sentence of divorce. Christopher Kenn married Elizabeth Beckwith in the 5th of Elizabeth. She libelled him for jactitation before the Commissioners for Ecclesiastical Causes, alleging his former marriage. Elizabeth Stowell intervened for her interest. The first marriage was a second time pronounced void, and sentence followed *ad exequenda conjugalia obsequia*. After the death of Elizabeth Beckwith, Christopher married Florence, by whom he had the ward. This matter was referred to all the Judges, who pronounced the sentence conclusive, so long as it should remain in force. And Lord Coke relied upon *Corbett's* case, the doctrine of which has been explained before. The point had been twice tried with Elizabeth Stowell, the grandmother of the plaintiff, and the sentences remained, open to litigation, but submitted to.

The case of *Jones v. Bow*, Carth. 225, it has been observed before, was of exactly the same sort. The plaintive claimed under the issue of Sir Robert Carr by Isabella Jones, between whom a sentence had obtained against the pretence of marriage, which then stood unlitigated.

In *Jessum v. Collins*, 2 Salk. 437, there was a sentence against the plaintiff in the spiritual Court, at the suit of the defendant, on that very contract, for which he brought his action on the case, without disputing the sentence.

The case of *Hatfield v. Hatfield* was also cited—a judgment of your Lordships in the year 1725. No authority is more conclusive than the judgment of such a Court, when the point decided is well understood. But nothing is more uncertain than the state of a point drawn from the printed cases, where each party

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takes care to state, at least, a probable case; and in the multitude of the reasons, good perhaps in law, if they were true in fact, it is difficult to divine what the House went upon. If this judgment depended, as the counsel for the prisoner contended, upon the goodness of the marriage, it carries the matter no further than abundance of other cases, namely, that the sentence of a Court Christian, while nobody contests it, binds the right of marriage between parties disputing elsewhere an incidental interest under it. There was an attempt to make it prove a collusive sentence available, which I shall have occasion to examine hereafter.

In *Cleeve v. Bathurst*, 2 Str. 960, and *Annaly*, 11, the sentence was against the very plaintiff in the cause, and remained uncontroverted.

So *Da Costa v. Villa Real*, 2 Str. 961, or *Mendez v. Villa Real*, *Annaly*, 18, was a sentence uncontroverted between the same parties. The like observation occurs upon Mr. Hervey's case.

In *Blackham's* case, 1 Salk. 290, the sentence was not held to be conclusive; and as to Lord Holt's doctrine, that must suppose the marriage put in issue between the same parties, for otherwise the sentence would not have concluded, the Court, which grants administration, having no direct jurisdiction in matrimony.

In *Millesent v. Millesent*, cited by Dr. Lee in Lord *Annaly*, 11, which I take to have been an appeal from the Prerogative Court, a sentence of the Consistory Court against a marriage was, while it remained unlitigated, a bar to the woman, who had been party to that sentence, from claiming administration as wife.

Upon all these cases I shall repeat but one observation, namely, that they bound only those who had been parties to the former sentence, or who derived under such parties. If they had extended to such as might have become parties by intervention or citation, the same principle would equally have borne them out. The general peace and happiness require that there should be some resort to hear and determine upon rights. The same peace and happiness require that litigation should have some end. The line seems to be fairly drawn where every claim to every right has had the full opportunity of being heard. But among all the cases cited or referred to I believe none is to be found where a sentence has been taken for conclusive against persons who neither had nor could possibly have agitated it.

It is not, enough, therefore, to establish the proposition that such sentences bind all who have or could have interposed, unless it had been shown that the King could have interposed, for the public good, in order to see that no fraud should be practised which might tend to defeat the execution of his laws or police. But it is not pretended that the King can interpose in such causes.

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It is not enough that a Court of exclusive civil jurisdiction, pronouncing upon the principal right, binds all the derivative or incidental interests. It should be shown that such a Court binds also to criminal conclusions. Now this I take to be impossible, because, on the very state of the proposition, the Court has no criminal jurisdiction.

It has often been attempted in argument to show that their Courts have no more than a censorial jurisdiction in their proceedings *pro salute animæ, et reformatione morum*, and to infer from thence that their judgments ought not to bind in questions touching civil rights, as in *Mendez v. Villa Real* in Annaly. But our Courts have taken the fact to be otherwise, and considered their sentence as a judgment upon the civil right, which is the reason why it binds all incidental interests in other Courts of civil jurisdiction. The true reason why such judgments have no effect in a criminal Court seems to be this, that there is nothing in common between the jurisdictions, so that they can never clash. A judgment in a civil suit will bind to all its consequences, although every fact upon which it proceeded should be evidently false, and though a criminal Court should have found a crime upon an opposite state of the case. An action and an indictment for a trespass may have contrary issues, and yet both must stand. So it would be if the crime were assigned in the very falsehoods by which the civil Court was deceived, as in indictments for perjury or forgery. A judgment upon a deed, after verdict on *non est factum* pleaded, is no bar to an indictment for forging, or publishing, or swearing to the deed. The case would be the same in respect to a will of lands established by verdict or to a will of personalty after probate.

It was in this last instance they attempted to show that the authority of the Ecclesiastical Court had been interposed between public justice and the crime of forgery. For this purpose they have cited the case of *The King v. Vincent*, 1 Str. 481. It is very short—"Indictment for forging a will relating to personal estate, and on the trial the forgery was proved, but the defendant producing a probate, that was held conclusive evidence in support of the will." Now, the support of the will was not in question. It was proved in common form, which is not binding, even in the spiritual Court (1 Ro.Rep. 21). More particulars of this case may probably be known to some of your Lordships; but I cannot find any. Stated thus, it certainly requires a great deal of consideration before it be admitted as law. Here the question was, not whether the sentence shall have credit in respect of the understanding which the spiritual judges have in the rules and course of their own law, but whether a probate, granted, of course, on the oath of the very party charged with the forgery, shall be a full and conclusive bar to the prosecution. This is too monstrous

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to be left upon the authority of a short and single case, without condescending to explain what consistency with public justice, what respect to common sense, will allow the crime of forgery or perjury to be defended by the allegation of that very fraud which the indictment meant to punish, not stating any trial or judgment upon it, but merely that it had been practised. If the pretended executor had repelled the objection of forgery, even in that Court, it would have borne some countenance at least; but the fraud passed without examination where, in the nature of the proceeding, none could be had.

The other case, in 1 Str. 703, of *The King v. Rhodes*, proves nothing, for it was merely a question of discretion whether the Court would proceed to try the forgery of an instrument while the property to be affected by it remained *sub judice*.

This is a matter of great consequence to public justice; at the same time it is the sort of case which must happen frequently. The fraud was commonly practised in the late war upon the sailors, and, if this rule had existed, could never have been punished. But it was frequently punished; and although, where no point of law arose, it is difficult to recover cases at the Old Bailey or on circuits, yet an accidental publication of cases in the Old Bailey, without any apparent selection, has produced three or four instances. One Stirling was convicted and hanged for forging a will, and, so little were either prosecutor or Court apprised of this notion of law, the probate made part of the evidence against him. He had registered it (as it was necessary) in the South Sea House. I am not anxious to state these cases with more particularity, because I cannot bring myself to imagine it will be entertained as a serious opinion that the mere perpetration of a crime may be pleaded in bar to a prosecution for it. This is certainly not for the interest of justice, nor for the honour of the spiritual Court, because it would take away from that jurisdiction one guard against falsehood and fraud, of which every other is possessed.

Thus much concerning the general proposition that sentences in the Ecclesiastical Courts upon civil rights with their conusance, have conclusive force upon public prosecutions for crimes, although it be confessed withal that the public has no means to intervene or review those sentences, and although the civil effect of such sentences is not touched by the event of such public prosecutions. If this ground fails there is an end of the present motion. But there is another view, in which it has been urged upon your Lordships, which seems to turn out more decisively against it.

Whatever may be said in the instances of forgery, perjury, and other frauds upon the spiritual Court, where the criminal Court may seem to impeach the foundation of their sentences, without assuming any jurisdiction in the matter of them in this case it is impossible to allege that the criminal Court is not fully

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competent to decide upon the whole matter of the indictment, particularly on both the marriages there stated, as constituting the crime.

The learned gentleman who spoke second for the prisoner informed your Lordships that this crime was formerly punished by the canon law and in the Ecclesiastical Court, and insisted that transferring the punishment of it from the ecclesiastical to the temporal jurisdiction should not prejudice any defences which the party might have set up in the first Court.

In order to make that observation bear, some proof should have been added that this sentence would have barred such a suit, however promoted, *exceptione rei judicatæ*. Then, supposing this jurisdiction no better than concurrent, this Court might have been barred *pari ratione*. But your Lordships have already had the trouble of hearing it established, but too much at length, from their books, that no such exception would lie in their law.

The same thing is no less true in our law, where the Court can, by any means, take cognisance of the right of marriage. Thus in dower, where the Common Pleas, by writing to the Bishop, can well try the lawfulness of the marriage, a sentence is no plea. This was ruled in the case of *Robins v. Crutchley*, 2 Wilson, 118, 127. The demandant counted as of the endowment of Robins. The tenants pleaded that she was not accoupled to Robins in lawful matrimony. The demandant replied that on 12th February, 1754, Sir William Wolseley libelled her as his wife, in the Bishop's Court of Litchfield, for adultery with Robins; that she pleaded a marriage with Robins; that the cause was removed into the Arches; that Robins died; and that afterwards sentence passed for the marriage with Robins, which then remained in force. The tenants demurred, and had judgment. The demandant cited many of the cases your Lordships have now heard to prove that a sentence, by a Court of direct jurisdiction, ought to conclude another which has but incidental cognisance of the same matter. But these were not thought sufficient to avoid another trial of the same marriage in a Court which, by writing to the Bishop, might well decide upon the lawfulness of it. It is clear that the sentence would not have concluded in the trial before the Bishop.

Nay, the very statute on which the indictment is framed proves the same thing. It excepts the cases where the former marriage is dissolved, or declared void by sentence, or was contracted under age of consent, all which would otherwise have been triable under an indictment for felony.

In order to prove that any sentence in the Ecclesiastical Court would bar an indictment upon the same matter, the case of *Boyle v. Boyle* was cited. It is reported in 3 Mod. 164, and in Comberbatch, 72. In that case a prohibition was awarded to stop the trial in the Ecclesiastical Court of a marriage there

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claimed by a woman in answer to a suit of jactitation, which marriage had been found bad on an indictment for polygamy, for which the man was convicted and burnt in the hand. The reason assigned here for this judgment was for fear the spiritual Court should not take notice of the judgment pronounced in the temporal Court. But this would have been extremely irregular, particularly if by the course of the spiritual Court such a judgment would have been conclusive. Prohibition never goes upon an apprehension that the spiritual Court will do wrong, but where their rules of trial are contrary to the common law, as in prescription, or requiring two witnesses to a release, or when they exceed their jurisdiction by holding plea of temporal matters as debts, freehold, or temporal offences. The reason for granting this prohibition was because the Court Christian could not take any cognisance of a matter adjudged in the temporal Court, which thereupon became temporal. So in the case of *Webb v. Cook*, Cro. James, 535, 625, prohibition went to the Court Christian at Norwich for entertaining a libel for defamation in saying that one had a bastard, who was adjudged the putative father. "For that judgment, being under the authority of the statute law, shall not be impeached in the spiritual Court or elsewhere, and all are concluded to say the contrary." Upon the authority of this case the same point was ruled again in *Thornton v. Pickering*, 3 Keb. 200. The Ecclesiastical Court has no cognisance of crimes. In the case immediately before that of *Boyle v. Boyle* prohibition went to stop a suit there for writing a libel, because an indictment will lie for it. In *Serle v. Williams*, Hob. 288, this matter is fully treated. The Ordinary has no power, even over clergymen, in a crime or offence touching the Crown. Purgation itself was by permission, and could not be administered if the temporal Court delivered *absque purgatione faciendâ*, nor between the conviction and sentence, nor before it. In all these cases prohibition would lie. And in every other case, if after trial of a felon they prove or disprove anything against a verdict, prohibition lies. So in *Higgon v. Coppinger*, Sir William Jones, 320, prohibition went to stop a libel for calling one a Sodomite. For, as they cannot find the principal offence, it not being "saved to them by the statute, they shall not hold plea of the defamation. And where anything determinable by the Ecclesiastical Court is made felony or treason, and the power of the Ecclesiastical Court is not saved to it, there they shall not meddle with the offence, or the defamation which arises out of it." The true reason, therefore, why they were prohibited in the principal case was because the plea depending before them was out of their cognisance.

Another case was cited where prohibition went to the Consistorial Court of Exeter after acquittal upon an indictment for polygamy, but I have not been able to find it.

More perverse inferences were never extorted from any cases

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than from these. A Court of Oyer and Terminer is to determine without hearing, for this special reason, that it will be final. A Court of direct, complete, and exclusive jurisdiction is to be bound and governed by one of no jurisdiction, either direct or indirect, on the matter. A Court, which decided once for ever, is to be bound by one which never decides. The sentence remains open for further examination; let it therefore be adopted without examination, in order that it may never be examined.

But, to confess the truth, all which I have hitherto said seems to have been unnecessary. This might have been pertinent argument if there had really been a sentence to combat. But there is none. It has been virtually, if not expressly, admitted that, for the purpose of deciding upon the present motion, your Lordships must take it for granted that the sentence is collusive and fraudulent in every view and to every degree which imagination can represent. For your Lordships will not put us, in this stage of the business, to take separate issues upon every suggestion which may be made for the prisoner. In truth, her counsel have argued it so, expressly contending that a collusive sentence shall bind the judgment of the House.

But what kind of case has been made or attempted? What authority has been cited that a collusive sentence shall prejudice others than the parties to it? In every book I have seen it is treated as a mere nullity. The only difference between no sentence and a collusive one is that in the first case you plead *null tiel record*, generally; in the last you plead that it was obtained by covin; consequently it is waste paper. If the Court was informed of the covin it would commit the parties for the contempt, and cancel the record. This could only be done upon the idea of the whole proceeding being a nullity.

In the 44 E. 3, 45, b, in assize of novel disseisin by a dowress the tenant admitted her title to dower, but disputed her assize, because she had been endowed by one who abated upon his possession by covin with her. She argued that the abator gained a fee simple, whereby he might lawfully endow her, that recovery of dower against an abator is sufficient, and that endowment *in pais* to one who has right is equal to recovery. The tenant replied that such endowment was but disseisin; therefore his entry was congeable, and that the recovery would have been in the same plight. All the Judges held clearly that "if one has action to certain lands, and by his assent and covin the tenant is ousted, and he who has the action brings it against the disseisor, he who is ousted shall have assize, and the possession of him who recovered shall be adjudged by abatement, and not by recovery, because he was a disseisor. *Et hoc adjudicabatur coram knivet.*"

The same point is laid down in many books, and in 3 Co. 78 it is taken as a general rule "that the common law so abhors fraud and covin that all acts, as well judicial as others, and

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which of themselves are just and lawful, still, being mixed with fraud and deceit, are in judgment of law tortious and illegal." Nay, it takes away the privilege of coverture and infancy, for the act is merely void. In the case in Coke the fine (a judicial act) was held for none, by reason of the covin. So Farr and Chadwick were both hanged for burglary, though they entered by an *habere facias possessionem*, because it issued upon a fraudulent judgment. This was thought to heighten the offence.

The principle of the rule applies equally to the judgments of the Ecclesiastical Court, and so the rule was applied in Dyer, 339, where a revocation of letters of administration was held void for covin. Thus, too, in *Garvan v. Roach*, 1 Vef. 157, Lord Hardwicke says of sentences in the Ecclesiastical Court that collusion will overturn the whole.

It would be idle affectation to cite all the cases on this head which indexes would furnish. The books are full of them from the Annals of Edward II. to the Reports of Sir James Burrow. Indeed, there never was a period of time in which this maxim was so continually in the mouth of the Court as the last. *Bright v. Eynon*, and abundance of cases more, might be cited to prove this. The Court seems to have thought it the principal and most capital part of its duty, the *nobile officium judicis*, to suppress and extinguish every species of fraud.

My Lords, the language of the civilians and canonists is exactly the same. Scaccia, in his Book *de Sententiâ*, gloss. 14, quest. 12, states this position, *ex vulgatâ regulâ, rem inter alios actam aliis non nocere*. Upon this he makes many limitations, upon all of which he adds, amongst others, this sublimitation—*Quando sententia esset lata per collusionem: fraus enim, et dolus nemini patrocinari debent, in alterius præjudicium; et ideo sententia, lata per collusionem, habetur pro non sententia; et aliis non nocet; quamvis, sublatâ collusionem, noceret*. The same thing is laid down by Covarruvias, in his Practical Questions, Cap. 15, N. 2. He quotes this text of the digest—*So hæreditatis judex contra hæredem pronunciaverit non agentem causam, vel collusionem agentem, nihil hoc nocebit legatariis*. In *Heraldus de re judicata*, Lib. 1, Cap. 2, N. 11, the same rule is given upon the same authority.

Nay, their Courts will receive an allegation against a judgment at common law, that it was by covin, and rightly too, for it is a nullity, and the authority of the Court in which fraud is practised is never in question. In *Lloyd v. Maddox*, Moor, 917, one sued in the Court Christian for a legacy. The executor pleaded recovery in debt, which exhausted assets. The legatee replied that the recovery was by covin. This allegation was admitted, and the King's Bench refused to award prohibition. Here both Courts agreed that to allege a fraudulent judgment was

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to allege nothing, and the inferior jurisdiction was expressly permitted to try this sort of nullity in the judgment of the superior.

There is a great abundance of cases more which I shall have occasion to cite to your Lordships if the actual fraud of the present sentence should ever be disputed, cases in which much weaker grounds of imputation than those which occur here have been thought sufficient to avoid a judgment. But, my Lords, what arguments have been used on the other side upon this part of the case?

First, it has been insinuated that certain statutes made against covin account for the many judgments to be found in our books, and prove that, without such statutes, they could not have obtained. But many of the cases were before the statutes referred to. The principle avowed by the Judges is independent of them. They all provide either additional sanctions against fraud or new precautions against the opportunity of practising it. And it would be a very mischievous construction if a statute against a particular fraud were to protect every other.

Secondly, the fraudulent sentence must be sent back to the Court where the fraud was practised in order to be corrected. Why so? If the thing alleged against a sentence were error, misjudging either the law or the fact, it must be reversed in the same jurisdiction, original or appellate. But the Court in which the sentence is pleaded must determine on the reality and application of that plea just as it would on any other matter pleaded. Fraud is a fact. The conclusion is that it puts a total end to the cause. The Court in which such cause depends must be as competent and perfect a judge of that fact as the Court in which the fraud was perpetrated. I say as competent and perfect, because the Court where the fraud has been practised, which has overlooked such circumstances as appear on the very face of these proceedings, does not seem to me the very place to which one would send a question of collusion to be tried. All the authorities referred to before, and the numerous instances of replying fraud to pleas of judgments by other Courts on which it was practised, contradict this notion. But cases are cited on the other side. *Kenn's* case, it was said, proves, upon the state of it, that the sentence was fraudulent. The bill in the Court of Wards stated that the sentence was false, and with a deal of aggravation. But who ever referred to an English bill for the true state of any case? The question referred to the Judges says nothing of the collusion. The case of *Morris v. Webber*, in Moor, 225, was also cited to prove that collusion apparent in an ecclesiastical sentence did not hinder it from concluding in a Court of common law. A man, divorced *propter impotentiam*, married another woman, and had children. The last circumstance, it was said, disproved the cause of the divorce; and therefore the judgment was apparently col-

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lusive. But that circumstance did not even prove the judgment false, for one may be *habilis quoad hanc*. The law presumes the children of a marriage legitimate, but that does not prove the fact of generation to any other purpose. If the ground of the sentence was false, it would not follow that it was collusive. Collusion was not even alleged in the case, and consequently makes no part of the judgment. In the same manner they referred to the appellant's printed case in this House, in *Hatfield v. Hatfield*, for an averment that the sentence was fraudulent. But there, as it happens, the state of the case disproves the collusion, for Porter, the defendant in the Ecclesiastical Court, was in the appellant's power. They cited also the case of *Prudham v. Phillips*, from a most inaccurate note in the margin of *Strange*, 961, who certainly knew nothing of the case he referred to. The case in truth was thus—Prudham brought assumpsit against Constantia Phillips. She gave evidence of her marriage with Muilman. Prudham produced a sentence of the Ecclesiastical Court annulling that marriage, because she was already married to Delōfield, who was then alive. She said that sentence was fraudulent. But the Court, admitting that the objection would have been good in the mouth of a stranger, would not suffer her to allege fraud in herself for her own avail. The learned doctors also cited a case of a Lady Mayo and a Mr. Brown in the Prerogative Court. There, a sentence in a matrimonial cause being pleaded, the adverse party alleged that it had been obtained by collusion. One learned gentleman said the allegation was repelled; the other that it was not admitted. I am informed the last is nearest to accurate, for nothing was done in that matter. The cause is still depending. The first argument promised all that length of erudition which your Lordships were favoured with yesterday; in view to which the Judge asked whether they had not better agitate the question of fraud where it was committed—an issue more natural for the Judge to wish than proper for the Court to award. The most loose and unconsidered notion escaping in any manner from that able and excellent Judge should be received with respect, and certainly will. But it is unfair to him to call this his judgment. If the question were my own, with the choice of my Court, I should refer it to his decision.

Thirdly, among other reasons against holding plea of the collusion before your Lordships, they insisted that it was not worth while; their sentences are so open to repeal at the suit of anybody that whoever finds them objected has nothing to complain of but his own remissness. Their proceedings are so frivolous and ineffectual, their judgments so inconclusive and harmless, that nullity, however established, makes no material difference in them.

Such were their particular arguments. In a more general way they pressed upon your Lordships with much earnestness the con-

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sideration of the unhappy case to which they said we would drive the prisoner. The sentence has deprived her of all conjugal claims upon Mr. Hervey; and we acknowledge it to be conclusive upon her, while we insist that it is merely void against all the rest of the world. She is, therefore, according to us, a wife only for the purpose of being punished as a felon. This strange apology was not insinuated in mitigation of the punishment or to the compassion of your Lordships, but directly and confidently addressed to your justice. Do not proceed to try the crime, because the purpose of committing it is totally frustrated, and many other inconveniencies have ensued. In other words, the crime has been detected. These disappointments, these inconvenient consequences of guilt are the bars which God and the order of nature have set against it, but they have not been found sufficient. It demands the interposition of public authority, with severer checks to restrain it. Why is she thus hampered with the sentence she fabricated? Because she fabricated it, because justice will not permit her to allege her own fraud for her own behoof, nor hear her complain of a wrong done by herself.

In short, my Lords, the motion is wholly inadmissible. It is inconsistent with all order and method of trial for us to debate imaginary topics of defence before hearing the charge, and for the Court to resolve abstract questions upon hypothetical grounds; is a sentence pronounced between two certain persons admissible evidence against others? Is this species of sentence so? Is either admissible against the King—in any public prosecution—in this particular sort of prosecution? Is such evidence probable only or conclusive—against the parties to it—against strangers—against the King—and in what cases? What, if it were obtained by collusion? What, if by her collusion? Will it serve her? May she offer it safely? How much will it prove against her? What evidence will do to prove the collusion? There is no end of such questions. At the same time, I was not solicitous to prevent any part of the argument. Were it possible for your Lordships to stop this prosecution here I have no desire to wound the mind of any person unnecessarily, or if so painful a duty may be dispensed with. But I have rather wondered to hear such hopes as these thus far encouraged, or even entertained on the part of the prisoner with confidence enough to make it worth her while to avow in this stage of the business that she had rather have everything presumed against her than hear anything proved, and to disclose to your Lordships, not an anxiety to clear her injured innocence, but a dread of the inquiry, a wish to submit in silence to the charge. Was this her solicitude to bring the question here? Of what avail would it be to anybody, in any condition, to appear in any Court and defend thus? But in such a Court, before so venerable an audience, to hear nothing pleaded against a charge

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of infamy but a frivolous objection to entering upon the inquiry, unless topics stronger, more pertinent, and pointed could have been urged, I am exceedingly sorry upon every account that the time of your Lordships has been thus taken up, and that we did not go directly into the examination of the matter before you.

The SOLICITOR-GENERAL—My Lords, there are two questions at present before your Lordships—the one turns upon the effect of a sentence obtained from the Ecclesiastical Court in a case of jactitation of marriage, which the counsel for the prisoner have maintained to be a conclusive bar to the inquiry now instituted in a Court of criminal justice; the other is, whether that argument ought to be admitted in this period of the proceeding. My duty requires me in the first place to submit to your Lordships some objections to admitting that sentence in anticipation of the charge, after a plea of not guilty to the indictment. The plea, which is the defence upon the record, denies the charge; but the argument contends that the charge ought neither to be stated nor proved. To proceed first to consider the merits of a defence without a charge established either by proof or admission of the party is at least a very great novelty in a criminal proceeding and a very wide deviation from the ancient course of trials, and it is a presumption of some weight that a mode of trial which has prevailed for ages is not founded in folly nor injustice. In the regular and ordinary course a prisoner who has any special matter to allege, which ought to bar the inquiry into the crime, must state it in the form of a plea of the indictment. Upon the plea of the party every Court of criminal jurisdiction must form a judicial determination. A pardon, a former acquittal for the same charge, are defences which preclude an inquiry into the crime; but the party can only insist upon such defences by pleading them, the Court can only take cognisance of them when pleaded.

The present proceeding would oblige the Court to try the validity of the charge by first hearing the defence; in the course of that hearing not only the state of the charge is supposed, but a reply to the defence by new facts is also taken by supposition; and, should such a method be permitted, your Lordships would be placed in a situation very different from the exercise of judicial authority, for Courts of justice are not instituted to decide a disputation upon a thesis of law; their province is to decide upon real fact, not upon general or hypothetical propositions, nor can they pronounce the law till the facts from whence that law arises are first established.

The counsel for the prisoner are obliged to state their argument thus—Suppose, say they, the first marriage to have been solemnised, but a suit to have been instituted to impeach that marriage, in that suit a sentence pronounced against the marriage; suppose that suit and sentence to have been fraudulent, yet even

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such a sentence ought to be conclusive, and to bar all inquiry into the crime of a second marriage. The only answer, which I submit to your Lordships such an argument at present demands is, that a Court of justice cannot suppose the fact of the marriage, nor the suit to impeach the legality of it; no supposition can be formed whether the proceeding in that suit was fraudulent, or was fair, the sentence real, or colourable; the parties must agree upon the facts before the Court can be asked to decide the law; if they do not admit the facts upon record, it remains for both parties to prove what they think material. Then, and not till then, it is the duty of the Court to pronounce the law.

No precedent has been quoted to show that a similar proceeding was ever admitted in a Court of criminal jurisdiction. One case only was faintly alluded to by the learned gentleman who spoke first yesterday. The case of *Jones v. Bow*, cited from Carthew, where the reporter says that, "by way of anticipation to the evidence that the plaintiff was about to give, the defendant produced a sentence of the Ecclesiastical Court in a cause of jactitation, a debate arose upon the effect of that sentence, and the Court being of opinion that the sentence was conclusive, the cause between the parties ended."

That cause was an action of ejectment to try the title to an estate. A proceeding by ejectment is well known to be entirely fictitious. In a suit founded upon a legal fiction to try a question of right, where the judgment is not conclusive on either party, there may be no mischief in pressing forward to the conclusion without an exact attention to forms. The case, therefore, does not prove that in a civil action, where judgment is given upon the mere right, such proceeding could have been allowed. But a criminal proceeding requires still more precision than a civil suit, and a deviation from the forms would very seldom be favourable to the accused. If the prisoner is not confined to the defence pleaded, neither would the prosecutor be confined to the matter of the charge; the Judge and the Jury would mutually encroach upon each other; nor could there be a more dangerous source of error and confusion than to permit a mixed consideration of law and of fact, of hypothesis and of argument, to be introduced into criminal trials. The only plea to the present indictment is not guilty. The argument your Lordships have heard supposes that such a plea ought not to have been put in; that there is a more prudent and cautious method of defence which you are desired to hear upon suppositions, without the form or substance of a plea.

The counsel for the prosecution are bound to oppose this experiment. It would ill become them, acting in the character of a public accuser, to advance any doctrine which they did not believe to be founded in law, or to suppress an objection to a proceeding which, as it is novel, cannot pass into a precedent

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without great danger and mischief. Should that objection prove that the argument, which in this stage of the business the counsel in defence have been permitted to urge, is inadmissible, your Lordships will, however, have no reason to regret the delay it has occasioned, nor to deem that time misspent which has been employed in the present inquiry, since the object of it, though fruitless, has been directed to the relief of a party accused. Supposing, then, the debate upon the effect of the sentence urged in bar of the trial to be proper at this time, I shall proceed to the consideration of the argument. The proposition advanced is this, that in an indictment upon the statute of James I. for marrying a second husband, living the first, a sentence of an Ecclesiastical Court, in a cause of jactitation of marriage, pronouncing that it does not as yet appear to that Court that there hath been a first marriage, is a conclusive evidence that no such marriage ever was had.

In order to make out this proposition the counsel contend, first, that it is a universal rule that the decrees of Courts having competent jurisdiction bind all persons, and conclude in all cases in any manner touching the matter decided. Secondly, they maintain that the sentence of the Ecclesiastical Court in question is a decision. They urge, in the third place, that the rule first laid down admits of no exceptions, but applies with more force to criminal than to civil cases. In the last place, they insist that, supposing this sentence to be the effect of fraud, collusion, and agreement between the parties to the supposed suit in the spiritual Court, it is notwithstanding conclusive upon all other Courts, and the fraud can only be examined in that Court whose justice has been thus ensnared.

My Lords, I have stated fairly the argument on the other side which rests on these four propositions, and, were I only engaged in a disputation with the learned gentlemen upon a mere thesis in law, I should be inclined by a denial to insist upon better proofs than have been offered in support of these propositions. I feel myself, however, under a very different impression of duty as one of the counsel for the prosecution. The prisoner may take every advantage that the law will allow; from us your Lordships have a right to except every concession that justice requires. I shall, therefore, admit (as far as in my conscience I think them admissible) the several propositions urged by the opposite side, state with as much fidelity as I can the true limitations of the doctrines advanced, and assert no point but what I hold to be clear law, supported by undoubted authority.

It is contended, in the first place, to be a universal rule that sentences of Courts of competent jurisdiction are binding upon all other judicatures in which any inquiry arises into the matter determined. That proposition I conceive to be much too largely

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stated. The rules and principles that I have learnt upon that subject I will very briefly submit to your Lordships, not meaning to argue, but only to state them. It is a general maxim of law that the sentence of a competent Court binds the parties and all persons deriving any right under them; as to third persons, it neither prejudices nor benefits them. Another maxim, equally true, is that a sentence of a Court having competent jurisdiction, if it comes collaterally before another Court in another suit, shall be presumed just till the contrary appears. One Court has no authority to direct the judgment of another; but it is a fair presumption that what hath been decided hath been justly decided; it is, however, but a presumption, and in most cases it obtains only till the contrary is proved. I admit at the same time that there are cases in which that presumption may amount to a conclusion. Where the sentence has been pronounced *in rem* by a judicature having a peculiar and exclusive jurisdiction over the subject-matter of the cause, the effect of such a decision is not to be controverted in any other civil suit. These propositions are founded in the consent of all lawyers who have treated of general law, and are proved by a series of judicial authorities; to quote them would lead into unnecessary detail upon a part of the argument which does not immediately apply to the decision of the point in question.

The cases cited on the other side agree with the distinction I have mentioned. A sentence of a Court of Admiralty upon the forfeiture of a ship, the judgment of the Court of Exchequer condemning goods as forfeited, are each of them conclusive upon this principle that the sentence is *in rem*, the Court has pronounced upon the property itself. The cases quoted of sentences of an Ecclesiastical Court are all in matters of which that Court has the peculiar and exclusive cognisance. The Ecclesiastical Court has the sole jurisdiction of cases testamentary and of cases matrimonial to a certain effect; if, therefore, a question arises, who is entitled to the personal estate of a man deceased, with or without a testament? the probate of the will, or a grant of administration, gives the title to the property in question; the effect of it cannot be contested in any other Court collaterally and incidentally, because no other Court has power to controvert the act, no other authority can confer the title to the thing in dispute. Such sentences are *in rem*.

The case is very different where the decision is upon a personal contract, or any matter arising out of the various civil relations of persons, in which the original cognisance of the cause might have come before the Court; where that decision is offered as an evidence of right, there the judgment of the foreign Court can only have effect so far as it is just; no authority belongs to it but from its internal justice, for the Court in which it is

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produced owes no obedience to the Court which pronounced it, and is equally competent to give the law to the parties. The effect of the sentence is beneficial, however, for the party who has obtained it, because the justice of it is presumed, the truth of the facts on which it proceeded is admitted without proof, and the adverse party is obliged to demonstrate the falsehood or iniquity of it.

In support of this distinction I will only mention to your Lordships one authority of a late date which I select from a multitude of cases, not merely because it is a determination in the last resort, but because the rule of law is stated in the judgment. The case I allude to was decided by your Lordships on 4th March, 1771, upon appeal from the Court of Session in Scotland, by *Sinclair v. Fraser*. The question there was, what should be the effect of a judgment obtained by the appellant in Jamaica? The person against whom that judgment was directed was sued upon it in Scotland; it happened that the Court of Session refused to give any effect to it, and held the party bound to prove the ground, the nature, the extent of his demand. From that determination an appeal was taken to your Lordships, the judgment of the Court of Session was reversed, and the words of the order of reversal were, "That the judgment complained of be reversed," and declare "That the judgment of the Court of Jamaica ought to be received as evidence *prima facie* of the debt, and that it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained."

My Lords, the authority that I quote to your Lordships will have considerable effect in a subsequent part of the argument. At present I only urge it as a proof, that though in cases where the sentence is *in rem*, where the Court has a peculiar and exclusive jurisdiction to determine the title to the thing in question, the presumption in favour of the judgment is admitted to be conclusive; yet where the judgment is applied to personal rights, to matters of which other Courts have equal cognisance, the party against whom it is urged is at liberty to impeach it, to show that it is not just, or that it has been irregularly and unduly obtained. This being the distinction in civil cases, the question arises, how far these rules are applicable to criminal suits? What effect ought the sentence of any civil Court to have as a bar to the justice of the State in the trial and punishment of crimes?

The counsel for the prisoner argue that, if the civil right is destroyed by the sentence of a competent Court, to examine into the crime is an absurd inquiry; where there is no relation there is no duty, and there can be no breach of it. Is this so? Is it then competent to a party by any act, destructive of the civil relation, to abolish the duties of that relation? Persons may deprive themselves of the benefit of any civil right, may dispense

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with the advantages of any relation of life, may be entitled to claim neither as wife, mother, nor child. But can they absolve themselves from the duties that belong to the natural relation? Can they, by their own act, absolve themselves from the sacred duties of those civil relations which in a state of society are natural relations?

My Lords, the proposition I contend for is so far from absurd that the contrary of that proposition would involve in it the most manifest absurdity. The civil interest is important only to the parties themselves. Whether an estate belongs to one person or another, whether a party is entitled to rank and distinction, to whom related, whose wife she is? The question is of great indifference to society; but if the estate, the relation, the rank, is obtained by criminal means; if the situation which a person chooses to relinquish is attended with duties, the advantage, but not the duties, may be waived, the peace and order of society must be maintained, and no violation of them can pass with impunity.

If there is a universal proposition of law, I take this to be so, that no determination between party and party can preclude public justice from inquiring into the criminal tendency of their actions; daily experience proves this in the most trivial instances. An action is brought for an assault, the party fails in it, there is a verdict against him; it does not prevent a prosecution by indictment upon the very same fact, against the very same party. In such an indictment was it ever pleaded that an action had been brought against the party for that alleged trespass and beating, and that he had been acquitted upon that action? The learned and reverend Judges will inform your Lordships that there is not a sitting or an assize without some instance of this sort. A question may arise in an action upon property to which of two persons a thing, a horse, for example, belongs; it is decided to belong to A and not to B; would that decision bar an indictment against A for stealing the horse? It is no answer to public justice that he has acquired that property when the object of the criminal inquiry is whether he has committed a crime in acquiring it.

The proposition advanced on the other side, that a sentence in a civil suit is conclusive in a criminal proceeding, was not so much pressed upon any deduction of argument, as asserted on the authority of a case cited from Strange's Reports, in which it was said to have been determined that the grant of the probate of a will by the Ecclesiastical Court was a bar to an indictment for felony in forging that will.

In the first place, your Lordships will give me leave to ask, does it enter into the imagination of any lawyer that the same rule would take place with regard to a will of real estate? Had

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such a will been produced in judgment, the witnesses to it examined, the validity of it canvassed, a judgment in favour of it, even a decree of the Court of Chancery establishing it, I do presume it will not be maintained that all those proceedings would prevent a prosecution for the forgery of that will. The same thing might happen in the case of a deed; a deed may have been established by a decree; the property of an estate settled by it, irretrievably perhaps; would there be no punishment for the crime if it should be discovered afterwards that that deed was a manifest forgery? The estate might be held indefeasibly by the party who had obtained it; but I do not conceive that his having got possession of that estate, having obtained an advantage of which human laws could not deprive him, would be an answer to human justice why he should not be punished for the crime by which he had gained that advantage.

It is supposed, however, that there has been a decision that a probate of a will of personal estate bars an indictment for forging that will. Is the grant of a probate, then, an act of so high a nature, requiring so much judicial accuracy, that it is not to be questioned? A probate in common form is not even a judicial act, it is merely official; there is no litigation, no inquiry; the conscience of the judge is not engaged in it. What is the purpose of forging a will of personal estate? To obtain a probate; for without it there might be a criminal intention, but no prejudice could arise to any person from that intention; shall it be said, then, that the accomplishment of the crime is to afford protection for itself? The authority relied on is a note in Sir John Strange's Reports, under the name of *The King v. Vincent*, that a person being indicted for forging of a will, upon producing a probate; a probate in the common form was held a bar to the proof of the forgery, and he was by the Judge acquitted. This is the whole note. It is a great misfortune that notes, very often taken upon loose information, are given to the world under respectable names. The collections of a lawyer, made only for his own use, must abound with errors; in publishing such collections many of these will escape; and this is not the only instance of mistake in that collection. I conceive it to be impossible at any period, at any time of the day, by the negligence of any Judge who might happen to be present at the Old Bailey, that a prisoner could have been acquitted of a charge of forgery upon such a defence. I say this with confidence, because, in the inquiry that has been made into the cases determined, many have been found where parties have been tried and convicted for forging a will of personal estate, and the evidence to prove the publication of the forged will has been the probate, produced by the officer of the Court, and his testimony that the prisoner was the person who obtained the probate.

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The Attorney-General quoted to your Lordships the case of *The King v. Murphy*. The prisoner there had the double villainy to turn the charge upon his prosecutor; the trial was attended by counsel who do not usually go to the Old Bailey; it is stated very fully by a shorthand writer at the end of the State Trials. The case of *The King v. Sterling* was also mentioned; it is very manifest that that unfortunate person was unjustly hanged if the case in *Strange* is law. *Sterling's* case was this: he was indicted for having forged a will, of which will he had obtained a probate, and under that title had transferred some stock; the person whose will he said it was was alive, and produced as the witness against him, and, of course, to impeach the probate of her own will. Absurd as it may seem to doubt whether that evidence was competent, if the case of *The King v. Vincent* was law, undoubtedly that witness ought not to have been permitted to prove her own existence; she was dead by irrefragable legal argument; but the event was different, and Mr. Sterling, notwithstanding the probate, suffered for his crime.

Besides these cases, there was another in no very remote period in which a party was tried for the forgery of a will in September Sessions, 1765, at the Old Bailey. One Richardson and one Carr were indicted for having forged a receipt for the payment of money, with intent to defraud a particular person, who was a seaman, entitled to wages; the common cases of forgery of wills have been in the case of seamen. Upon the trial it appeared that the receipt was given in the name of Jane Steward, who was the supposed executrix of a will of this seaman, which had been proved by the defendant Carr, upon the oath of the other defendant Richardson. The learned Judge, Mr. Baron Perrot, who tried them, was of opinion that the prisoners ought to be acquitted of the charge of forging a receipt for the money; but, being satisfied from the evidence that Richardson had forged the will, notwithstanding it had appeared in the trial before him that a probate had been granted of that will, he remanded Richardson to gaol to take his trial for the forgery of the will. Richardson was accordingly tried in October Sessions, 1765, for forging the will of John Steward, a mariner. The officer of the Prerogative Court proved upon that trial that the will was brought to his office by Richardson, and a probate of that will granted; and upon that proof he was convicted and executed. The first learned Judge had remanded him to prison to take his trial at the ensuing Sessions for the forgery of a will, the probate of which was then in Court; and upon the second indictment, which was tried by the noble Lord who presides in the Court of King's Bench, the prisoner was convicted, notwithstanding the will had been proved. Other cases have been mentioned to your Lordships to the same effect with these, which sufficiently refute that singular case of *The*

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King v. Vincent, the only authority to support the argument that the sentence of an Ecclesiastical Court is a bar to an indictment.

Having thus removed the only obstacle to the proposition I meant to rely upon, that in a criminal matter a sentence of a civil Court ought not to be conclusive against a public accusation, I now proceed to a more limited and close inquiry, what effect the sentence of jactitation ought to have in this proceeding, an indictment for bigamy?

It is of no importance to the present inquiry to investigate by what means the cognisance of causes matrimonial and testamentary belongs not to the Sovereign of the State, but is given to an order of men dedicated to the service of religion. The fact is, that in the jurisprudence of this country causes matrimonial and testamentary are of ecclesiastical cognisance. The right to try them is not derived from the King as the fountain of justice, nor exercised by the King's Court; but wherever the royal authority interposes, it is not as Sovereign of the State, but as supreme Head of the Church. The law did not even interfere to punish the violation of the matrimonial rights, and adultery, which in most countries of Europe is treated as a crime, but was not considered in England as an offence punishable by the Magistrate, but left to the correction of ecclesiastical censure. At length, however, the violation of conjugal duty, accompanied with the circumstance of an open attack upon the order of society by a second marriage, was, by special statute, made a crime. When I say made a crime I do not mean it was made more immoral, but it was made a subject of criminal cognisance by the Magistrate. The learned counsel who spoke second yesterday contended that this statute gave no jurisdiction to the temporal Courts to pronounce upon the legality of the marriage, but that the jurisdiction of the Ecclesiastical Court, as to the trial of the marriage, remained still absolute. It was necessary for his cause to attempt this argument, but to maintain this proposition is a very difficult task. The Legislature, fifty years after the Reformation, has declared that the crime of bigamy shall be punishable as a felony by the Magistrate. To convict a person of that crime, must not the Magistrate try him? Has he not the power to acquit or condemn him? Has he only an authority to inflict the punishment, as in old times, when the Church delivered over the offender to the secular arm? and is the sentence of the spiritual Court to guide the conscience of the Judge and Jury in the criminal Court? The sentence of the Ecclesiastical Court in the present case is said to be against the first marriage, and, therefore, it is urged the prisoner ought to be protected by it; but, if the argument is just, it must hold equally where the sentence is for the marriage; it sounds less harsh to contend that a party declared not to be married in the first instance by the spiritual Court shall not

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be questioned for the second marriage. But by the same rule we must conclude that if the spiritual Court had determined for the marriage in the first instance, and the fact of a second marriage had been proved, it would not have been competent for the prisoner in an indictment for bigamy, so circumstanced, to have made any defence; he is concluded by the sentence, the Judge and Jury are bound to believe it, and, upon that sentence, without examination, to convict and to punish.

The effect of the statute I take to be very different; it has created a new offence, and for the trial of that offence the cognisance of the lawfulness of marriage is given to the temporal Courts. As to all criminal consequences that Court has cognisance to determine, as well as the Ecclesiastical Court, what is and what is not a legal marriage between the parties. That it has so the case of *Boyle v. Boyle*, quoted to your Lordships for another purpose, is a clear proof. That was a prohibition issued to the Ecclesiastical Court to enter into an examination into that cause of marriage which the Court in trying the indictment had determined. The other case mentioned by the learned doctor is to the same effect. The two cases differ only in this, that in one the party was convicted, in the other acquitted; but the Court was of opinion in both that the Ecclesiastical Court could not interfere.

It is unnecessary, however, to have recourse to authorities, for the statute itself has decided this question. The Legislature seems to have had it in view that, a jurisdiction being newly given to the temporal Courts in the trial of marriage, questions might arise as between concurrent jurisdictions what should be the effect of sentences pronounced by the Ecclesiastical Court. It was a wise foresight in those who compiled the statute to define in what cases the sentences of the Ecclesiastical Courts ought to preclude any inquiry for the crime, and it is defined in the words of the exception, "That this Act shall not extend to any persons divorced by the sentence of the Ecclesiastical Court, nor to any persons where the former marriage has been by the Ecclesiastical Court declared void and null." There are two cases then put by the statute in which the sentence of the Ecclesiastical Court protects the party against a criminal inquiry—sentence of divorce and sentence of nullity of marriage. If, therefore, the Ecclesiastical Court, having competent jurisdiction, has either divorced the parties, or if it has pronounced sentence of nullity of marriage, the sentence in these two instances is conclusive. But the statute has no exception in favour of a sentence in a cause of jactitation. There is no pretence to argue that a sentence in a cause of jactitation is either a sentence of divorce or that sentence which makes the marriage void and of no effect. No lawyer, no civilian can make that mistake. What, then, does the exception prove? Two

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sentences of the Ecclesiastical Court are recited in it, the third is omitted; and it is a general rule of law that, wherever a statute excepts particular cases, the exception of those cases extends the statute to all cases not excepted. That proposition is too clear to require authorities to be cited in support of it. The law, therefore, which says the trial of polygamy shall proceed in all cases, except where a sentence of divorce, and except where a sentence of nullity of marriage has intervened, does virtually say that a sentence in a cause of jactitation of marriage, which is neither of divorce nor of nullity, shall not bar the trial. I conceive, therefore, the statute to have decided this question.

The argument on the other side is put in a more plausible form by stating the defence to be founded upon a fact, of which the sentence of the Ecclesiastical Court is the best evidence. There can be no double marriage, it is said, because the sentence disproves the first marriage. This mode of stating the argument makes it necessary to examine the nature of a suit for jactitation of marriage in order to see what credit is due to the sentence when offered as evidence to disprove the first marriage.

A suit for jactitation of marriage is from beginning to end totally singular. Some writers on the canon law derive its origin from the doctrine of pre-contracts, which, by the ecclesiastical law, constituted a marriage. And till that very mischievous prejudice was destroyed by the late Marriage Act it is not surprising that any attempt to lessen the evil should meet with encouragement. The form of the suit is this—The supposed husband or wife complains to the Ecclesiastical Judge that he or she is a person free from all matrimonial contracts or engagements with the adverse party, and so esteemed by all neighbours, friends, and acquaintance; that the adverse party, notwithstanding the knowledge of this, has falsely and maliciously boasted of a marriage with the party complaining; it concludes, then, by such false assertions an injury is committed, and prays that right may be done by declaring the party free from all matrimonial engagements with the other, and by enjoining that party perpetual silence. The party defendant may either say I have not boasted, I deny that fact, or, if he admits that he has boasted, he is then to go on and allege circumstantially a marriage, which the other party denies, under the circumstances alleged. If the marriage is not proved, then the Court pronounces that, so far as yet appears, the party complaining is free from matrimonial contract with the other party, and enjoins perpetual silence.

After this sentence, so gravely pronounced, your Lordships are told by all the learned doctors, and all the books of practice agree, that this injunction of perpetual silence continues no longer than till the party choose to talk again; and the person to whom he may with the most perfect safety repeat his assertions is the Judge

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who enjoined him silence, for it is agreed on all hands that the party may at any time inform the Court that, though it did not appear formerly that he was married, he can make it appear now, and such proof is admissible.

The forms of all Courts had probably a good original, and this suit may have been introduced to prevent a greater mischief; but it is impossible to avoid collusion in such a proceeding which has no avowed object but to correct the indiscretion of a supposed discourse, and which, as the learned doctors on the other side truly state, has no termination, and between the parties themselves never obtains the best effect of a judgment to put an end to litigation. In modern times such suits have seldom been commenced but to favour some indirect purpose, and were the sentences allowed to have the effect that is now contended for, were they to be a bar to all criminal inquiry, it might be expected that suits which, as the learned doctors state, may be carried on without end would very frequently spring up.

Nothing can be further from the temper of my mind upon the present occasion than to use a ludicrous argument; but when the uncontrollable effect of such sentences as these, so contrived and framed for fraud, was urged yesterday, and while, to lessen the objection to them, it was gravely argued that no great mischief could happen from the decision, because you may reverse this sentence to-morrow, that the next day, and a third after that, and that the suit was in its nature eternal, an ingenious person among the bystanders was calculating how many wives a man that had a taste for polygamy might marry with impunity. And I think he made it out, according to the probable duration of such a suit, that a man between twenty-one and thirty-five might, with good industry, marry seventy-five wives by sentences of the Ecclesiastical Court, each sentence standing good till reversed, and all reversible by that judicature.

My Lords, the argument is serious, though it presents a ludicrous idea, for one consequence would probably attend a decision in support of the authority of such a sentence. The Marriage Act put an end to that terrible disgrace of a civilised country, Fleet marriages. While they subsisted it was a common practice for indigent women of easy virtue to get a Fleet husband to protect them from their debts. If a sentence of the Ecclesiastical Court is to have effect against all but the parties, a cause of jactitation will supply the place of a Fleet marriage, and furnish a husband by sentence, whom the lady may remove whenever he proves inconvenient. This is but one instance, and in the lowest class of the evils that would follow from allowing such sentences to be interposed against public justice or the rights of third persons. What guard can there be against uncertain issue, uncertain rank, and all the numerous mischiefs that arise from

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doubt and collusion introduced in the relations that form the bonds of society?

Were all considerations of the consequences attending such a decision to be laid aside, the very form of the sentence argues against its being conclusive. What says the Ecclesiastical Court in that sentence?—"As far as yet appears no marriage is proved." The verdict upon an indictment will say, "It does now appear that a marriage is proved." The two propositions do not clash with each other; there is no contradiction in them. To the party it is said you have not proved the marriage; a public accuser does prove the marriage; the justice of the country has brought out the evidence of that fact which the party either did not incline or was not able to produce. There is no repugnance in the different propositions, no incongruity in supposing that the sentence may stand as between the parties, and yet shall have no conclusion either as to the public or as to third persons.

The argument in favour of the sentence was supported by this dilemma. What becomes of this sentence if the indictment for bigamy goes on? Is it null, or has it any effect? Is the party a wife, or no wife? I answer, to all civil effects no wife, the party has bereaved herself of any right to benefit by the relation; to all criminal effects a wife, because that relation, the duties consequent upon it, and the responsibility for the breach of those duties, cannot be destroyed by the act of the party. I could quote to your Lordships other cases where the party takes no benefit from his act, where he holds the situation only to make himself amendable to the justice of his country. I refer to a known case. A man had committed an act of bankruptcy by collusion with a creditor, and a commission of bankruptcy was taken out against him, the object of which was to procure a discharge from his debts. He chose to conceal a part of his effects, for which he was indicted upon the statute making it a capital felony for a bankrupt to be guilty of any wilful concealment; it came out clear as the light that he was no bankrupt, that is, no bankrupt to any civil effect; he could not avail himself of that commission of bankruptcy against any creditor that had a mind to dispute it, except the creditor who had colluded with him; but though he was in fact no bankrupt he was tried and convicted as such.

My Lords, after the indulgence with which your Lordships have been so good as to hear me so long upon this subject, I am sorry to be obliged still to trespass a little longer upon your patience when I consider the fourth proposition, which certainly is not the least material, that is, that a sentence, infected with fraud, to which collusion may be objected, is no bar in any cause. My Lords, upon that head the principle is so plain that the illustration of it will not run into much length, and the authorities are so decisive that I shall only state and not argue upon them.

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A sentence obtained by fraud and collusion is no sentence. What is a sentence? It is not an instrument with a bit of wax and the seal of a Court put to it; it is not an instrument with the signature of a person calling himself a registrar; it is not such a quantity of ink bestowed upon such a quantity of stamped paper. A sentence is a judicial determination of a cause agitated between real parties upon which a real interest has been settled. In order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit. There is no Judge; but a person, invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him. There is no party litigating, there is no party defendant, no real interest brought into question; and, to use the words of a very sensible civilian on this point, *Fabula, non iudicium, hoc est; in scena, non in foro, res agitur.*

The ground, then, upon which I contend that a collusive sentence is no bar is shortly this, that such a sentence is a mere nullity. But it is insisted that the Court which pronounced the sentence can alone declare the nullity of it, and till repealed it must stand good and valid. The authorities to which I mean to refer upon this head will refute that argument at the same time that they prove the general doctrine.

The first is my Lord Coke's reasoning in *Fermor's* case, 3 Coke, 77. He concludes the resolution of the case in this manner—"Thereupon it was concluded that if a recovery in dower or other real action, if a remitter to a feme covert or an infant, if a warranty, if a sale in market overt, if letters patent of the King, if presentations and admittances, that is to say, if all acts temporal and spiritual should be avoided by covin, for the same reason a fine in the principal case levied by fraud and covin shall not bind." Nothing can be more explicit than these words to show that there is no necessity that the covin should be prosecuted in the Court in which the judgment was obtained. The case of *Lloyd v. Maddocks* in Moore, 917, is a direct and a plain authority. There a fraudulent judgment was set up against a plea of a legatee in the spiritual Court; the question in the Court of King's Bench was, whether the spiritual Court should be prohibited to enter into the consideration of the fraud of the judgment, which is certainly not a matter of ecclesiastical cognisance; but the Court was of opinion that the covin was aptly examinable in a Court Christian to that effect, and therefore the prohibition was denied.

My Lords, the other authorities are more modern though not more decisive upon the point than this. The first I mention to your Lordships is the case of *Prudam v. Phillips*. There is a very bad and a very inaccurate note of it in Sir John Strange.

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The note, from which I cite it, is a manuscript note of Mr. Ford. In that case it was determined by Lord Chief Justice Willes that a fraudulent and collusive sentence against Mrs. Constantia Phillips was binding upon her, but he concludes it was binding upon no other party; the fraud was a matter of fact, which if used in obtaining judgment was a deceit upon the Court, a fraud upon strangers, who as they could not come in to reverse it, they could only allege it was fraudulent. He said in that case that any creditor of hers might reply that it was fraudulent and avoid the effect of it. The other cases I refer to are my Lord Hardwicke's authority in the case of *Roach v. Garvin*, 1 Vezey, 159, and in the case of *Brownsword v. Edwards*, 2 Vezey, 246. In the case of *Roach v. Garvin* the question was upon the effect of a marriage said to be established by the sentence of a Court in France. Lord Hardwicke enters into the consideration of it thus—"The question is whether this is a proper sentence, in a proper cause, and between proper parties; whether a marriage is had in fact, or any contract *in præsentia*, as a sentence in the Ecclesiastical Court would be conclusive unless there be collusion, which would overturn the whole." In the other case the ground is exactly the same.

From these cases I conclude it to have been the uniform opinion of all the great Judges who sat in Westminster Hall from the time of Lord Coke down to the present time (and the Courts were never more ably filled) that fraud and collusion not only vitiates, but absolutely annuls; and that a sentence obtained by fraud is, literally, no sentence at all; therefore the objection of such an instrument, of so much paper and writing, is the objection of a mere nullity, and can have no effect neither in a civil nor in a criminal suit. Having troubled your Lordships so very long, I will take up no more of your time even to recapitulate the heads of the argument, but hasten to return my humble thanks for the great indulgence I have already experienced.

Mr. DUNNING—My Lords, I purpose to give your Lordships very little trouble; indeed, I should be without an apology if I had thought of giving you much, finding, in the station which I hold in this cause, the subject completely exhausted, and I cannot but suppose your Lordships' attention in a great measure tired, notwithstanding the occasional relief which the entertaining parts of the cause have afforded has given you. I have the less inclination to give your Lordships much trouble, as I feel a degree of surprise that it should have been thought necessary for the counsel on the part of the prosecution to give your Lordships any. The subject for immediate consideration is the competency of obtruding this sentence, in this stage of the cause, to stop the cause here and to require of your Lordships to decide it without

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any regard to the truth or the justice of the case; such, however, it is contended is the effect of this paper that is offered to your Lordships under the name of a sentence of the Ecclesiastical Court. The novelty of the attempt it is not my intention to expatiate upon. It has been truly observed to your Lordships that some prejudice at least may be expected in the minds of your Lordships against an attempt so novel, for, though I am not so blind an admirer of antiquity as to take for granted that everything that is new is therefore wrong, sure I am, I am warranted in expecting your Lordships' concurrence in thinking that those who propose at this time of day to introduce into the judicature of this country a new practice ought to be prepared with such reasons as should compel your Lordships' assent. This, I think, may be fairly insisted upon the head of novelty.

The gentlemen undertake to maintain, first, that this evidence is competent and admissible; secondly, that it is conclusive; and, thirdly, they insist on this conclusion, not only upon the supposition that it is a sentence fairly obtained between real parties after an adverse agitation of the question which it is supposed to have decided, but though all these circumstances should be totally wanting, and though the contrary of them all should be the truth of the case, the sentence is insisted on as equally conclusive. In that extent it is, that the gentlemen have undertaken to maintain this proposition, and a very considerable task, it seems to me, they have undertaken. My Lords, I consider the sentence as read only *de bene esse*, merely that your Lordships may know what the contents of it are, that you may have the assistance of that knowledge in judging not only of the ultimate effect of it, but of the propriety of receiving it at all in this stage of the business. At the first blush to be sure it seems a little absurd that your Lordships should be to decide the cause before you have the smallest knowledge of what the case is that is to be stated upon the part of the prosecution. It is certainly necessary for those that are to judge of this paper to know what it is; it is a sentence in a Court, of which your Lordships heard yesterday abundant commendation. It was observable that those who were most lavish in that commendation were least acquainted with the practice of that Court. The first of the learned doctors spoke with a very becoming modesty of the Court in which he practises. The other explained to your Lordships the nature of a jactitation suit as concluding nothing, being to be revived at any time, and consequently having no end. It was contended by all the gentlemen that this Court was entitled not only to what on the part of the prosecutor we should have had no difficulty perhaps to have admitted, to co-equality with the Courts of temporal jurisdiction, but to something superior. It was contended that there was something in the nature of this subject that made it peculiarly the

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province of that Court to judge of and to decide upon; not that they have better means of information, not that they have better rules of decision, but from something unexplained in the constitution of the Court, it was rather assumed than attempted to be proved that to that Court exclusively belong matrimonial questions, questions on the rights of marriage, and even of the facts of marriage. I am persuaded your Lordships all go before me in feeling a conviction that there is not in that extent a foundation for that claim. Yet this peculiarity of jurisdiction, and the consequential necessity, in order to get rid of the sentence, to resort again to that jurisdiction appeared to me to be the points principally insisted on. Neither of them, I trust, your Lordships will think are made out at present. I am considering the first, that to certain purposes, and with a view to certain consequences, the spiritual Court is the only Court in which questions of matrimony can be agitated, is most true. There alone it is, that the party deprived of and complaining of the want of conjugal rights must resort to seek them. There it is, where the party supposed to be injured by a false claim of a marriage, when none exists, can obtain redress for that injury. But to other purposes, and various are those purposes in which the question of marriage arises, whether it is to be examined into with a view to temporal or spiritual advantages, whether it is to be examined into with a view to rights derived from it, or punishments for crimes committed in relation to it, to the temporal and not to the spiritual Courts belongs, I conceive, this question of marriage. My Lords, to suppose otherwise would be to deny in fact that your Lordships sit here with any jurisdiction at all; for if it were true in the extent to which it was contended, that to the spiritual Court exclusively belongs the consideration and decision of the question, marriage or no marriage, it will follow by a necessary consequence that if there were no such sentence as the present to be thrust in our way, and to create this temporary difficulty, for such I trust it will prove to be, if there had been no decision in the spiritual Court at all, your Lordships would only have been in the possession of this cause for the purpose of writing to the Bishop to know how the fact stood, and from his certificate to take your ideas of the question which you are to decide upon. The gentlemen must maintain not only that there was not at the common law anything like a jurisdiction, but that this statute, which means in terms to give a jurisdiction, has not in point of effect given any. I am at a loss to find a way, consistent with what the gentlemen have maintained, to deliver them from that consequence. If they insist that no temporal Court has a power to inquire into a question of marriage, it will go to that extent. They have made a distinction between those cases in which the question is the point of the cause, and in which

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it arises incidentally. The question does not arise at all unless it arises materially; if there be anything in the distinction, let us see a little how it will help this argument. Was the marriage the gist of this cause in the spiritual Court? No. The lady applies to the spiritual Court, assuming that there was no marriage, complaining of an injury, which consists in the circumstances of a man who was not her husband taking to himself and boasting (as a man would be apt to boast in such circumstances) of the honour of bearing that relation to her.

This cause is not in its nature a question of marriage, but of defamation. If that which the lady suggested had been admitted to be the truth of the case, he would have been to excuse or extenuate his offence, just as the nature of his case would enable him to do, by either denying that he had boasted or stating what had led him into it. But this defendant says, No. I have held that language, which you call boasting. I will not dispute with you the propriety of that appellation. I have called this lady my wife, because, whether it be my good or ill fortune, she is my wife. It is for that reason, and that reason alone, that I have held this language which is imputed to me as a crime. I am no criminal in holding this language, for that is my situation, and this is my defence. Thus it is that the question of marriage is introduced into the cause; it is insisted upon as a defence; as a matter material to her defence it is that the question of marriage in this cause arises. Is it less incidental or more direct than the same question arising in the ordinary way in which it arises in temporal Courts? A person claiming to be the legitimate son of his father commences an ejectment, in which the question of legitimacy turns out to be the only question in the cause; it is essential to his supporting his claim that the Court who are to judge of it, and the jury that are to decide upon it, should be satisfied of the facts that the claimant is the eldest and the legitimate son of the father. The point of marriage is not the point of the suit directly, immediately, ostensibly, and upon the face of the record in that cause, but incidentally, materially, and necessarily that point becomes a point in the cause. Just thus in my apprehension this cause stands; and, as applied to this cause, the gentlemen cannot avail themselves of the distinction between the jurisdiction to be exercised incidentally, and to be exercised directly, upon the subject of marriage. One of the learned doctors represented his ideas of this jurisdiction exercised in the spiritual Court as if it was a jurisdiction to decide upon an abstract question. I am persuaded the learned doctor in the use of that word meant only to say that in their forms of proceeding, and in some of those causes which are instituted in their Courts, the right of marriage, in contradistinction to the fact of marriage, was more immediately pertinent than in some

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of the proceedings in temporal Courts; which to be sure it is. In any other sense of the word the learned doctor used it inaccurately; for that Court, any more than this or any Court, has no jurisdiction to try abstract questions of any sort. No question ought to be agitated in any Court whatever unless it be a real question springing from a real interest and between real parties. To agitate any other question is an insult to the Court. There is a sense in which the Court may be said to have agitated this in the nature of an abstract question; for it is certainly true, if our instructions have any foundation in truth, no one circumstance of the actual case of the parties was before the Court or made any part of their inquiry. I trust I shall be thought to have done enough at least for the Ecclesiastical Court in admitting that their sentences are equal to our judgments; that they are not entitled to more. I may safely contend when I am admitting that they are entitled to as much attention as is due to a decree of a Court of Equity or a judgment of a Court of law. In such an admission at one time I should have been thought to have gone much too far. I trust the learned doctors will forgive me if I cannot carry my civility any further. God be thanked we live at a time when a better understanding of the subject, and a more liberal way of thinking upon every subject, has so far abolished the ancient differences between the different judicatures in this country that we and the learned doctors may meet together without quarrelling. Their proceedings in cases in which it is competent to them to proceed deserve the same attention and faith as those of temporal Courts. This appears to me to reduce the claim upon the part of those that are to support this sentence precisely to this situation, and it is impossible to carry it one jot further. It is an opinion of a Court, not having superior or exclusive, but having a concurrent jurisdiction of this question, having competent power to decide, and having no powers to exclude another decision elsewhere, where for other purposes, criminal or civil, it may come to be discussed according to the forms which those different judicatures usually observe in their proceedings, totally unobstructed or assisted by any attention to what has passed in any other judicature. This, I trust, will be your Lordships' judgment upon the question agitated between us, if it should be material.

I laid in my claim to object to the admissibility of this piece of evidence upon which, if I should have the good fortune to have your Lordships' concurrence, the subsequent consideration of the effects of it, if admitted, will become totally immaterial. I deny that this is admissible in a Court like this, a Court of the highest criminal jurisdiction in this country.

It is so familiar that it would be impertinent to that part of the Court to which I have the honour to address myself, which

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is more particularly conversant in the forms of proceeding in Courts of justice, to be labouring to prove that when a subject is examined into in the course of a criminal inquiry, under the form of an indictment or of an information, what has passed or may pass in the course of a civil inquiry upon the same subject and the same question is not only regarded, but is not admitted. In the instance that was put, and many others that may occur to some of your Lordships, it is perfectly notorious, and therefore neither requires argument nor proof, that the practice is certainly so. Let a man be acquitted in a Court of criminal jurisdiction, it does not preclude a party complaining of an injury arising from that act, which in a criminal Court has been presented as a crime, from seeking redress for the civil injury; and *vice versa*, the fate of such an action cannot be inquired into, much less cannot it preclude the proceedings in a subsequent criminal inquiry, taking its rise from the same act. It has been inquired into in a Court of one description; it is now inquiring into in a Court of another description.

One reason—there are others—why Courts of criminal jurisdiction do not admit any account of what has passed upon the agitation of the question in a Court of civil jurisdiction may be the liability to fraud and collusion. I am not now arguing upon the fact of collusion in this case; but it is obvious that if this would do, if the sentence of a Court of such jurisdiction, whether ecclesiastical or temporal, will preclude a criminal inquiry, the receipt is of ample use, and all men may, if they please, cover themselves against the penal consequences of their crimes by instituting a friendly suit. Some such we have known to have been so conducted as to escape the attention of the Judges, who have not found out till after the cause has been decided that the cause has been collusive. Cases of this sort are so open to fraud and collusion that for this reason, if there were no other, the Courts of criminal jurisdiction will always reject such evidence. I do not know that a case has yet existed where any person has done so strange a thing as to put it in the power of the Court to receive or reject by offering such evidence. Your Lordships have had cited to you a case which, having been treated as it deserves, need not be repeated by me—the case of *The King v. Vincent*. If it were possible to suppose that case could be law, that supposition is removed when your Lordships are told that a different opinion upon the same point has been held by the Judges that have succeeded in the same Court and to whose knowledge or ability nobody that knows who they are would, I believe, object. The last of these cases, *The King v. Stirling*, I am aware, may be attempted to be distinguished, and for what I know the first of them may, by saying that the question did not occur, the objection was not taken in either of these cases; but your Lordships, knowing before

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whom those criminals were tried, will believe that no such objection would have escaped these Judges if it had been founded in law, although no counsel objected to it, or although the criminals perhaps had not the assistance of counsel; therefore I consider that case as fairly dismissed, and the subsequent cases as carrying an authority upon our side that more than overturns it. But I do not conceive that even this was wanting, for the instrument in the case of *The King v. Vincent* has no resemblance to the sentence now offered; it was an official instrument, necessary to give sanction to a legal right. Letters of administration or a probate may be admissible, but it does not by any means follow that a sentence like this is admissible here; if it be, it must be equally admissible on all sides. The gentlemen argue that your Lordships should receive it, should act upon it, should conclude upon it. Why? Because it is a sentence rescinding the marriage, declaring that there was no marriage; that is the import of this sentence, and therefore it operates in their favour, and therefore it happens that they produce it. Let me invert the case. Let me suppose that when this lady instituted that suit, the party who was the object of it had supported that defence, as we conceive he was very well able to have done, and that in consequence the cause had ended in a declaration or a sentence that there was a marriage. In that case would it have been evidence upon the part of the prosecutor? Would it have been attended with those consequences which they are claiming for it now upon the part of the person prosecuted? Would your Lordships have endured that the prosecutor should have come here to support this indictment by no other evidence than the production of a sentence in a suit like this in the spiritual Court, by which that Court had determined Mr. Hervey and the lady he had married were husband and wife? Can I possibly state it to any mind that comprehends it that does not at the same time revolt at the apparent hardship and injustice of such an idea? And, yet, is there anything more true than that a record cannot be evidence of one side which would not, if it had imported the reverse, have been evidence and with equal force of the other? I conceive it to be one of the fundamental rules to determine what evidence of this nature is or is not admissible, that if it could not have been admitted on behalf of the party objecting to it, supposing its import had been favourable to him, so neither shall it be admitted on the part of the person proposing it. I trust I may be warranted in presuming that your Lordships think as I do—that in order to support this indictment something more than such a sentence would be required from us, and that the Legislature in making this new provision meant that the fact should be inquired into, as all other facts are inquired into; that the relation should be proved by those who were witnesses to it, by

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those who can prove the confession of the parties to it, or by those who can give such other evidence as Courts of criminal jurisdiction are authorised to act upon. Can anything then be more obviously unsuitable to any ideas of justice than that the inquiry should be precluded by a record in favour of one of the parties, which might have been as favourable to the other party, and which, if it had been, would not have been regarded?

If your Lordships think fit to admit this evidence, and by so doing to raise a question upon the effects of it, the gentlemen argue with some appearance of triumph that this kind of sentence is conclusive, for that there are various instances in which sentences of these Courts in which judgments of other Courts have been held conclusive; for this purpose your Lordships are furnished with a great string of cases, some of condemnations in the Court of Exchequer, some even from Boards of Excise, some from Courts of Admiralty, some from domestic and some from foreign Courts. There has existed, and fitly existed, such a comity in the practice of one Court towards the proceedings of another that, whether the Court be foreign or domestic, the Courts presume that what is done is rightly done, that there has been no collusion, that there has been no fraud, that the judgment and decree is what it ought to be, the effect of an adverse suit between adverse parties. Presuming the effect of such sentences, such decrees and judgments, in civil causes to have been what it has been stated to be, it must have been upon the supposition and upon the presumption that the sentence or the decree has been fairly and rightly obtained. But if this degree of conclusiveness were allowed to it in criminal cases, if such a sentence were allowed to be conclusive where the parties are unprepared in point of evidence to impeach it, and if such were allowed to be the effect of it in such a case in Courts of criminal jurisdiction, it would obstruct the course of justice in a thousand instances, and in effect operate to the repeal of this and many other wholesome laws. In this instance the mischief would too be great if the policy of this law be questionable, if that which we call a crime is an innocent action. If there is no impropriety in the practice now brought under your Lordships' consideration, if polygamy deserves encouragement instead of a check, then in another character your Lordships will do well to repeal the Act; but do not do it in your judicial character.

Cases may be supposed—and we are in a situation that authorises us, nay, not only authorises but requires us to suppose—the grossest cases that our imaginations can furnish. It is not difficult to suppose a case in which the directest fraud upon the Court may be practised by means of the grossest perjury, and yet through the collusion of the parties it may be managed with so much dexterity that it would be impossible to get at them, and in

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all these instances the effect I am now deprecating would be, of course, let in upon the criminal jurisdiction of this country.

I am persuaded your Lordships will not do this. In what I have said upon this point I have anticipated in part the question which I stated as the third in the Order in which I purposed to consider the argument on the part of the lady at the bar. All her counsel have attempted to contend for the conclusiveness of this sentence, and they all mean, I presume, to insist upon it as precluding an inquiry into the mode of obtaining it. The other learned gentlemen will excuse me if I seem to have been less attentive to what fell from them than to the second counsel on the part of the lady. The fact is I heard him more distinctly than those who preceded or followed him. He chose to consider this Act as not having created a new offence, but as having simply varied the punishment and mode of trial of a known offence which existed as the law stood then. I am at a loss to comprehend in what sense this can be considered as having not created a new offence. This Act declares something to be a felony which before was no felony; this Act creates that to be a felony, inquirable into in the way in which other felonies are by law inquirable into, in a case that was before only cognisable as an offence against the canon law, and inquirable into in a suit which had nothing for its object but the spiritual interest of the party. I conceive it to be a new offence in the same sense in which almost all the statutable offences in this country are new offences. This Act has not only created a new offence, but, as I conceive, abolished an old one; for I doubt whether it be now competent for an Ecclesiastical Court to proceed to inquire into offences of this sort if it were (as has been supposed) their practice before this Act. By the custom of London a certain species of defamation is actionable there, and upon that ground the temporal Courts proceed in granting prohibitions to stay proceedings of the spiritual Court in such cases; so I apprehend the Courts would do here, if the spiritual Court proceeded *pro salute animæ* in a case of polygamy. My learned friend assumed that this sentence would stop the proceedings of such a cause in the Ecclesiastical Court, but referred to the learned doctors to make it out, which the learned doctors, I presume, not liking the reference, forgot to attempt; so it stands as a point assumed, but not proved, that the spiritual Court would at this time entertain such a suit, and that its progress would be stopped by such a sentence. Your Lordships heard a very pathetic description of the melancholy situation in which the lady will stand under this sentence if this prosecution proceeds, and in consequence of it she should be treated in the disagreeable way to which the Act exposes her. She will, nevertheless, it has been said, after having been punished as a married woman, be totally destitute of any advantage in present or future of that marriage; she can

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never claim any conjugal rights, nor (if her circumstances did not preclude the necessity of her seeking it) could she compel any maintenance from this gentleman during his lifetime, nor can she, if she survives this supposed husband, support any claim to his fortune.

The husband is in the same lamentable situation. It is equally incompetent to him while this sentence stands to derive any advantage in point of comfort during her lifetime or in point of succession upon the death of the lady. It may be so; but if it is so, it will not be the effect of the judgment your Lordships will be to pronounce. It is the effect of those practices between the parties which have produced this sentence, and which have made this their situation and their state.

It will be time enough to consider this question when the case arises. If ever this lady should reassume an inclination to establish that relation, which in this suit she has thought good to disclaim, or if it should ever be the pleasure of the Earl of Bristol to connect himself again with this lady under the relation of a husband, it will then be time enough to inquire what they can or cannot make of such a claim, or what the impediments are which they will have to remove in order to establish that claim. As neither of these cases are very likely to arise, it is immaterial to go further into the inquiry of what may probably or possibly be the consequence of them. It occurred to the learned gentleman to consider that it was very possible he might be led by this train of reasoning into the consideration of the effect of the collusion. Your Lordships will permit me to remark that the learned gentleman who spoke first upon that side of the question chose to be perfectly silent upon this head. He did not seem to know that it would be likely to occur to us in the consideration of this sentence to suggest that it was collusive; for unless it were by an allusion to the case of *Hatfield v. Hatfield*, the notion of collusion, as making a part of this question, did not seem to have occurred to him. Mr. Mansfield saw the certainty of the collusion being introduced into the argument. To obviate it he used three cases—two that had been mentioned before, and a third he introduced for the purpose. The first, in the order of time, was the case of *Kenn*, in my Lord Coke, which whoever reads will see that the only point determined, and the only point to be determined in that case, was that it was not competent for the party to traverse an offence that had been found against him. All the rest is that sort of lucubration which adorns, and in many instances improves, the reports of that learned Judge of the decisions of his own time. And this is the use that is attempted to be made of this part of the argument, that it was founded in falsehood, and therefore was upon the face of it collusive. The falsehood was that the party was in a condition, as it turned out by subsequent inquiry,

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to have made a better case than he did make; and from thence it is to be taken for granted that of purpose and design he abstained from making that case that he did not make. Your Lordships know better the nature of business than from such a circumstance to infer a fraud. The best-bottomed causes often miscarry for want of that evidence, without which they cannot be supported. The next case—that of *Morris v. Webber*, from Moore's Reports—seems to me to be still less material or useful to the purpose for which it is produced. That was the case of a divorce *propter impotentiam viri*; the parties marrying afterwards, fruit of each of these marriages was the birth of children. Perhaps it may occur that that circumstance did not afford a very decisive and conclusive proof of the negative of the ground upon which that decree was pronounced; it is not an impossible case that what had happened might happen, although the divorce was perfectly well founded in point of fact. But suppose it were taken for granted that the child must of necessity be the issue of a man who had been divorced *propter impotentiam*; yet that it must of necessity be inferred from thence that this sentence was collusively obtained remains to be made out. I conceive that this case, any more than the one that proceeded it, does not afford a colour to say that the question of collusion and the competency of going into the question of collusion occurred to the Court in either of these two cases. In the case of *Hatfield v. Hatfield* a man who, under colour of being the husband of the woman, had taken upon him to release some interest which she was entitled to, and he claimed to be entitled to in her right, and the question turned upon the effect of that notion; there was afterwards a sentence between the parties against the marriage; whether the means to obtain it were fair or foul, fraudulent or otherwise, were left to guess at. Your Lordships will not, I presume, adopt all the printed reasons, good, bad, or indifferent, that are offered to your Lordships at the close of your printed cases. Your Lordships' predecessors in that case could do no otherwise than they did; they saw that the decision in the Court below was right, and upon that ground they affirmed the decree. Now what was the thing decreed and the point in controversy between the parties? The man, while he passed for this lady's husband, took upon him to release an interest, which it was not competent for him to release, whether he had or not that character, the subject of the release being a legacy left to her under a will in such terms as operated to give her in equity a separate interest. I need not contend that in a separate interest of the wife the husband cannot control or deprive the wife of it by any release of his. A Court of Equity had decided against the party claiming under the release, which, according to the settled doctrine of Courts of Equity, it was equally bound to do, whether the party releasing had or had not married the

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woman whose interests were to be affected by it; and the question (husband or no husband) was just as foreign to the merits of that decision as anything that could be talked about in the cause. Totally, therefore, laying out of the question all that had been said upon the subject that was not necessary to the decision of the case, the House of Lords affirmed the decree of the Court, because they saw it had rightly decided the only point in controversy between the parties. These, then, are the cases upon the ground of which, and upon the ground of which alone, for I have not been able to collect a fourth, your Lordships are desired to decline doing that in this instance which we contend your Lordships are bound in justice to do; that is, to let us into the inquiry by what means this sentence was obtained. The gentleman particularly who made this use of these three cases could not forget the familiar practice, which he is a witness to every day of the year, of impeaching the judgments of the Courts of law whenever they are impeachable upon the foundation of fraud and covin. It never occurred to a Court in which such a question arises to refer the party who makes a complaint of a judgment so obtained to the Court in which it was obtained, or to direct him to institute a suit to get rid of it; he impeaches it just when it affects him, and not further than as it affects him; beyond that it is a matter of perfect indifference to him whether it stands or falls; for the purpose of doing that, which alone he is interested in doing, the party, who would otherwise be prejudiced by such a judgment, is constantly and daily permitted to say that this was a judgment obtained by covin. This allegation is usually formed into an issue, and if that issue is determined in his favour, though the judgment stands as to every other person, *quoad* him it is avoided in the manner we are ready to avoid this sentence. It was said that the reason why creditors are permitted so to avoid judgments set up to their prejudice by executors or administrators who seek to cover effects in their possession by false judgments is because these people cannot be relieved in any other form; it cannot be referred to any other Court. I am perfectly content to take that as the principle; then it remains, in order to support this distinction, for the learned gentlemen among them to make out that it is competent to His Majesty to make himself a party to this suit in the spiritual Court, or to institute there, by his proper officer, a new suit to get rid of this sentence. The gentlemen have not attempted it; it would be ridiculous; and I fancy I may presume it will not be attempted. It is not competent, much less necessary, for the King or his law officers to go into that Court for a purpose so idle as this. Taking this, then, to be the reason why it is admitted in civil causes to creditors to get rid of judgments, by which they are attempted to be injured, by showing that they were collusive and fraudulent, does it not

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follow by parity of reason that it is equally proper that the same thing should be done here, supposing that your Lordships should for a moment forget this to be in a criminal cause, in which the reasons for so doing are so much the stronger? Another distinction between this case and that was attempted. It was said this is not the case of a third person complaining of an injury arising by a sentence, and wishing to avoid it so far only as it affects him; but it is a suit instituted for overturning the sentence. I apprehend it is not so; we contend for nothing but to lay this sentence out of our way as applied to the present subject, just as you lay out of the way a judgment between A and B where it is attempted to be used to the prejudice of C. After your Lordships have convicted this lady, if in the result of the inquiry it should be proved that such is the justice of the case, I do not know that the verdict or the judgment in this case will be evidence upon an inquiry into the same facts for another purpose. If the result of the present inquiry is understood to establish the marriage and to nullify the sentence, it is because the sentence is in its nature, when it comes to be inquired into, really and truly null and void, not because that such is the effect of any operative power and force that belongs to your Lordships' conviction. This is not a prosecution for the annulling of that sentence; this is a prosecution to subject the party to the punishment which is by law due to the offence charged upon her. It cannot be attended with any other possible consequence. Upon the same ground that the sentence is attempted to be impeached here it may be impeached everywhere, except by the parties, who may perhaps have precluded themselves by their conduct from impeaching it.

As there are no authorities on the one side, it remains for a moment only to observe that there are authorities on the other side. As applied to civil cases, two have been mentioned; the good sense of both the authorities, particularly of one, I should apprehend establishes this proposition clear of all controversy, for, when in the case of the action against Constantia Phillips of famous memory, it was determined that whatever objections would avoid a judgment in a Court of common law would be sufficient to overturn a sentence in the spiritual Court, but none other, one should have imagined that the proposition carried with it so much good sense that all the world should feel it and adopt it. The Scottish case is by the highest authority, and there the true use that is to be made of a judgment in another Court is ascertained and limited; it is evidence; it is strong evidence; but it remains to be explained; and still more it remains to be laid out of the case in a cause like this and in a case like that of *Phillips*, where there existed a ground to impute collusion and fraud to it. In *Phillips's* case it was not permitted to her to avail herself of that collusion and that fraud. Why? Because it



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was a fraud of her own. But the learned Judge, when he refused to permit her to impeach that sentence, which she had obtained by collusion and fraud, adds, according to Mr. Ford's manuscript note, that, as against all others, whatever objections would avoid a judgment in a Court of law would be sufficient to overturn a sentence in the Ecclesiastical Court. We desire to overturn this sentence upon no other grounds than sentences and judgments in Courts of law are every day overturned. They must continue to be so overturned in future as long as there continues to be any attention to truth and justice in the decisions of Courts of judicature. I do apprehend that your Lordships will not think that I take an improper freedom with the sentence, or the Court whose sentence it is, by desiring that your Lordships will by and by form an opinion of the purity of their proceedings by the specimen that we shall give you of them when we come to state and prove the means by which this sentence was procured; and then, perhaps, your Lordships will see no reason for raising it above the level of other Courts on which we are content to leave it. With your Lordship's permission I would supply an omission I meant to have stated in its proper place—the case of *Robins v. Crutchley*. A Mrs. Robins commenced an action of dower, claiming a share of the succession to her supposed husband, Mr. Robins. This lady had been claimed to be the wife of a Sir William Wolseley. Sir William ———, upon the supposition that she was his wife, had instituted a suit in the spiritual Court, probably with an intention to get rid of her, charging her with having committed adultery with Robins. In the course of that inquiry in the spiritual Court it came out, to the satisfaction of the Court, that she was the wife of Robins, and not of Sir William ———. This sentence was introduced in pleading in this cause of dower for the purpose of repelling a denial on the part of the heirs of Mr. Robins that she bore any relation to them or to their ancestor. To that replication there was a demurrer, which brought under consideration of the Court of common pleas the effect of this sentence so pleaded. The opinion of the Court of common pleas was to allow that demurrer; and though the point decided may, perhaps, be only this, that that sentence could not avail the party in that form of pleading, yet I conceive that point must be very erroneously decided if the sentence were of the description which has been attempted to be passed upon your Lordships; for, if it had been understood to be conclusive and preclusive of all further inquiry, most undoubtedly it would have been a proper subject to be introduced in pleading as a bar to any further inquiry. Your Lordships, by looking into the only report in print of that case (Mr. Serjeant Wilson's) will find that the learned Judges of the common pleas, who decided it, seemed to be agreed in thinking that it was very far from an established

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point that this sentence was conclusive, that the question could only be tried upon the issue *ne unques accouple*, which your Lordships know to be the only proper issue in a question of dower, and that issue must be determined by the Bishop's certificate. Now, we are told that this sentence is just equivalent to the certificate of a Bishop. This was so far from being the opinion of that Court that they leave to the Bishop to judge for himself what regard he would pay to that sentence on the point which he was to certify.

Dr. HARRIS—My Lords, it would ill become me at this time, after the points which have been proposed have been so fully discussed by the gentlemen who have gone before me, to take up much of your Lordship's time. There are two questions, as I understand, before your Lordships. The first of them is, whether a sentence in a cause of jactitation can be given in evidence as an absolute bar to a prosecution by the King? and the other is, whether, on supposition that a sentence in a cause of jactitation can be given in evidence, it will afford a complete defence, so that no proofs whatever can be admitted afterwards in order to counteract and impeach that sentence? How these questions come before your Lordships, whether properly or improperly, is not for me to argue. It is out of my profession to say anything about them; but, as the gentlemen on the other side have been permitted to state them and argue on them, it is certainly necessary that they should also be discussed by the counsel for the prosecution.

In regard to the first question, I shall not trouble your Lordships long, because the discussion of it relates principally to the practice of Courts of law; but shall more particularly attach myself to the consideration of the second, as I shall in so doing have an opportunity to say a word or two in answer to what the gentlemen have urged on the other side who are of the same profession and practise in the same Courts where I have the honour to attend. In respect to the first question, whether a sentence of jactitation is an absolute bar, and can be offered as such to a suit at the prosecution of the King, it is to be observed that anciently the whole cognisance of marriage, with that of the crimes attending it, was vested in the Ecclesiastical Courts. But those Courts being either remiss in the exertion of their jurisdictions or, more probably, wanting power to inflict an adequate punishment sufficient to stop the growth of the increasing evil, and the Legislature, for constitutional reasons, being both unwilling and unable to invest them with more authority than they then had, the aid of Parliament became absolutely necessary; and the statute of James I., on which the prisoner stands indicted, was accordingly made, by which it was enacted that, if any person being married

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shall marry another, the former husband or wife being alive, the offence shall be felony.

Before this statute the Ecclesiastical Courts had the cognisance of the crime of taking a second wife or a second husband whilst the first wife or first husband was living. But the statute, as I understand, takes that branch of the jurisdiction, namely, the power of inflicting any punishment whatever on a person guilty of polygamy entirely from the Ecclesiastical Courts; inasmuch that, if at this time a process was to issue from an Ecclesiastical Court in order to call any person to account for bigamy or polygamy (whichever it may be termed), the party cited might obtain a prohibition from the Judges of the temporal Courts to stop such a suit in the same manner as a prohibition may be obtained in case of a prosecution in an Ecclesiastical Court for perjury not committed in that Court, or for any other crime punishable by a statute. Now, my Lords, it is evident that the one Court has lost what the other has gained in respect to the offence of bigamy; so that the temporal Court, or rather your Lordships, are able to judge of bigamy, and of every ecclesiastical matter incident to that branch of spiritual jurisdiction. It may here be observed that a jactitation cause is described in our books of practice to be a *quasi*-defamatory suit, and most certainly it is so and nothing more, when a person libelled against in jactitation confesses the boasting, as when a man cites a woman for boasting, and she acknowledges the jactitation; for the cause ends here, and is strictly of a defamatory nature. But I do not mean to deny, when the defendant undertakes to justify, that the cause then becomes truly matrimonial; for the sentence will then necessarily be either that the parties are man and wife, or that the plaintiffs or party agent is free from all matrimonial contracts, *quantum nobis constare potuit*, or as far as to us yet appears. But though a sentence in these words may have frequently been adjudged (as in *Jones v. Bow*, Carthew, 225, and in *Clews v. Bathurst*, Strange, 960) to be binding on the temporal Courts in cases of property till reversed, yet it by no means follows that such a sentence can amount to an acquittal of the plaintiff from having any further evidence brought against him, the very words, as far as to us yet appears, implying the contrary and evincing that further proofs may legally be adduced in the proper Court. The words of the sentence speak sufficiently for themselves. There is no occasion to have recourse to authorities from books. Let it be supposed for a moment that the ancient jurisdiction remained in the Ecclesiastical Courts, and that they possessed their former power, is it possible to conceive that a sentence like the present, pronouncing a woman to be a spinster, as far as to the Court as yet appears, could be a bar to a suit in the same or in another Ecclesiastical Court against the same woman for polygamy? If

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it could be a bar it would amount to an acquittal till the sentence in the civil suit had been reversed, which would be subversive of justice by making the commission of an undiscovered crime in one Court a shelter against the punishment of that very crime in another. If the doctrine now contended for should prevail, that the offering of a sentence in jactitation pronouncing the party agent free from matrimony as far as it as yet appears is an absolute bar to a criminal prosecution, there would be an opportunity on every indictment for polygamy to defeat the statute; for in the case of a woman marrying two husbands, if the first husband should consent to a collusive suit, the wife would have nothing to do but to cite the first husband into an Ecclesiastical Court for jactitation if she apprehended a prosecution on the statute; and then either on confession of the boasting by the first husband, or on his failing to prove his marriage, if he undertook the proof, a sentence would be obtained which would entirely defeat the statute. That this House should give a countenance to a doctrine of such tendency is not to be imagined. It would be so far to restore the Ecclesiastical Courts to their former authority as to put it in the power of evil-disposed persons to use those Courts to the defeasance of the statute without giving back to the Ecclesiastical Courts a jurisdiction to punish the crime of polygamy, which would thus go unpunished. It would be to render those Courts in this respect hurtful, without affording them an opportunity of being useful; and it would in effect be to destroy a law in your Lordships' judicial capacity which had formerly on the maturest consideration been established in this House as a part of the Legislature.

It would now be improper for me to detain your Lordships any longer on this question, which has been so ably and fully discussed already, and I shall trust that your Lordships cannot be prevailed on to declare the sentence in jactitation conclusive upon this High Court, or to suffer it to be read judicially as a stop to any evidence which may be brought as a proof of the marriage of the lady at the bar with Mr. Hervey, now Earl of Bristol.

But on supposition that the sentence may be permitted to be judicially read, it may be necessary for me, in contradiction to what the gentlemen of my own profession have asserted, to trouble your Lordships with a word or two in the briefest manner I am able in order to show that evidence of a particular kind may be given in all Courts and at all times to rebut a sentence in jactitation in disfavour of matrimony for the purpose of relieving an injured party and of punishing the guilty.

It is a general rule, which is not to be denied, that respect is due from one Court in England to the decisions of another, and that comity is due to the decisions of all foreign Courts; and it

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might be more accurate and more strictly true to say in general that one Court in England is bound by the judgments and sentences of another; but the generality of this rule does not exclude an exception, which in reality affords a proof of its generality; for, under circumstances, evidence of every sort, parol as well as instrumental, may be received in one Court to affect a sentence in another. Fraud in a single person, and collusion, where there are two or more, may be given in evidence in the same Court in a different suit, or in another Court, to affect the parties to a sentence, and, of course, to affect the sentence or judgment itself in some degree.

It is true that by the ecclesiastical law a sentence in any case obtained by collusion may be declared void in the same Court in which it was pronounced by means of a special suit for that purpose, and most certainly at the suit of a person having an interest, who could not even have intervened at the time when the suit was pending; and such was the case of Lady Frances Meadows, who had no interest in the years 1768 and 1769, when the suit of jactitation was pending. But it does not follow, because a sentence obtained by collusion may be annulled in the same Court where it was pronounced, that such sentence may not be impeached by any means whatever in another Court.

I shall not, in proof of what I have advanced, detain your Lordships with a repetition of the particulars of *Fermor's* case, as reported in the Third Part of Coke's Reports. I shall only observe that it was a case depending in the Court of Chancery in 44 Elizabeth before Sir Thomas Egerton, the then Lord Keeper, in which Richard Fermor complained that Thomas Smith, the defendant, was his tenant, and had levied a fine with proclamations in order to bar him of his inheritance by covin and practice. The Lord Keeper, considering on one side the mischiefs which might arise from such practice, and on the other side considering that fines and proclamations are the general assurances of the realm, referred the case to the two Chief Justices, Popham and Anderson, who, after a conference, thought it necessary that all the Justices of England and Barons of the Exchequer should be assembled—they assembled accordingly, and it was at length resolved by the two Chief Justices and Barons of the Exchequer, except two, that Richard Fermor was not barred by the fine with proclamations. The Lord Keeper, Sir Thomas Egerton, commended the resolution of the Judges, and agreed with them in opinion.

The precedents and reasons on which the above-mentioned opinion was formed have already been ably related, and are well known to some of your Lordships. It may suffice on my part to add that a fine, the most deliberate (for it is five years in completing) and, of course, the most solemn of all judgments, was not deemed, in the opinion of the Lord Keeper and ten of the Judges,

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to be of weight sufficient to protect a colluding party; but was suffered to be impeached by the admission of evidence in another Court than that where the fine was levied, in order to afford relief to an injured man.

It is said by Lord Coke in the same report that all acts ecclesiastical as well as temporal shall be avoided by fraud and covin. And, indeed, if one temporal Court is bound in justice and law to pay no regard to the judgment of another temporal Court under the circumstances above described, can any reason be given why the sentence of an Ecclesiastical Court in such a case should be treated with more respect by the temporal Judges than they are obliged to pay to the judgments of their own Courts?

But to the honour of the temporal Courts it must be said that, as far as it is in their power, they lend their aid to the Ecclesiastical Courts in case of covin and collusion by permitting the Ecclesiastical Courts to try such fraud, even when committed in the temporal Courts, as incidental matter. The case alluded to is in Moor's Reports, page 917, *Lloyd v. Maddox*. Mr. Lloyd, a legatee, sued Maddox, the executor of the deceased, in the spiritual Court for his legacy. The executor alleged that all the testator's effects had been recovered from him, the executor, in a Court of common law by a creditor of the testator. The legatee alleged in his turn, and undertook to prove in the Ecclesiastical Court, that the recovery at common law was in consequence of collusion or covin between a pretended creditor and the executor. And, upon the admission of this plea in the Ecclesiastical Court, the executor applied to the temporal Court for a prohibition, which was denied. And from this it is evident by necessary inference that the temporal Courts must have deemed themselves competent to judge incidentally of covin or collusion committed in a spiritual Court, in order to relieve an injured party or suitor in a temporal Court.

When this liberty taken by one Court with the apparent judgment of another, under circumstances, comes to be considered, it seems to be founded on the strongest reason. For when a judgment has been procured by a collusion of parties, though it must stand on record, and may not, I grant, be actually expunged or taken from the file, but by the Court in which it was given; yet it is certainly a mere nothing to those who, not being privies, can show it false and covinous. It is a sentence in which the Judge had never an opportunity of doing real justice, and is undoubtedly, what it has been justly styled by a writer on the civil law, a stage play, a profane mockery, or anything but a judgment. It is not to the disrepute, but to the honour of a Court, as well as to the benefit of the public, that such a fraud should be detected. The upright Judge must of all things wish it. And confident I am, that to discover such a profligate proceeding

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(from which no human wisdom can protect the greatest judicial abilities) could never be construed into a breach of comity between one judicature and another; but, on the contrary, must be construed by the deceived Court as a vindication of its purity and a rescue from an attempt to load it with discredit.

I must now own, my Lords, when I was informed that doctors of the civil law were, by the permission of your Lordships, to attend on the part of the lady at the bar, and a brief was given to me on the part of the prosecutor on that account, that I was apprehensive of what might be quoted from such miscellaneous books as the digests, the code, and the decretals in favour of collusion, and to show how honestly it might be practised under particular circumstances. Nothing, however, of this kind has been urged, and I have not myself, from any inspection of the titles and text of the civil and canon law, *De collusione detegenda*, which treat principally of collusive causes between masters and slaves, and between certain of the clergy in order to defraud the laity, been able to gather any other idea than that collusion between parties to a suit is a very high offence, and such a one, I make no doubt, for which colluding parties might now be articulated against in the Ecclesiastical Court, where the insult was offered, and be punished at discretion by ecclesiastical censures. But a particular discussion of the nature of the offence committed by parties colluding in a cause, how that collusion is to be treated when discovered, and what operation the discovered collusion will have upon the sentence, is rather to be expected from later writers, and such authors as Menochius in his *Consilia*, or *Scaccia de re judicata*, than from the laws in the text of the civil and canon law.

And these authors agree in general in saying, *Quod lata sententia per collusionem habenda est pro non-sententia, et quod aliis non nocet, quamvis, sublata collusione, noceret. Nam facta collusione cum adversario (says Scaccia) sententia non prodest adversus tertium; vel quia tertius erat citandus, et tunc victori non prodest sententia, etiamsi eam obtinisset sincere.*

As when an executor (for example), desirous of proving his testator's will, omits to cite one among others of the next-of-kin; for in that case the omitted person may, if he thinks it for his interest, oblige the executors to prove the will *de novo* at a subsequent time, the sentence establishing the will under the process, by which one of the next-of-kin was omitted, being as to him in the true sense of the expression, *Res inter alios acta*. The same author proceeds by adding, *Vel non erat citandus, quia causa agebatur cum legitimo contradictore; et tunc licet, si sententia fuisset lata sine collusione, tertio noceret, tamen, si fuerit lata per collusionem, non nocebit*. This may be explained by the following supposed case:—If an executor to prove his testator's will should cite all the

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next-of-kin regularly, but should collude with that next-of-kin to whom the management of the suit was intrusted, and prevail on him to faint-plead, and not put forth his strength on account of some private bargain, and by this covin establish the will; yet, though the sentence in this case would have bound the legal contradictors, who had been all called, and also all other persons whatever, if there had been no collusion, it shall nevertheless not bind the injured part of the legal contradictors on a proof made of the concerted fraud.

It must be allowed that these writers have not (as far as I have been able to observe) made mention of the place or Court where a sentence collusively obtained is to be set aside; and, if an actual setting aside or total reversal is meant, there is no doubt but that this must be done in the same Court where the parties colluded, and in no other. But if it is only asked where and in what Court evidence is to be received to relieve an injured person who was not a party to the collusion? my answer is, that it is plain from these writers, as well as from reason, that it is to be received in every Court.

The courts of civil law, known to these writers, hear in the same Court and under the same jurisdiction causes of property, and also accusations which affect the life of the accused, exactly in the same manner as our Admiralty Courts in England did before 28 Henry VIII., and therefore when Scaccia and other writers, who entertain the idea of the same Court having both civil and criminal jurisdiction, say that a sentence obtained by collusion is to be regarded *pro non sententia*, their meaning fairly taken must be that such a sentence would be effectually avoidable, or rather disregarded everywhere, on a proper proof made of the fraud by which it was obtained.

I am aware that the case of *Mayo v. Brown* was quoted by the advocates on the other side as a late instance in which the present judge of the Prerogative Court, Sir George Hay, whose decrees will always have great weight, was of opinion that he could not in his Court receive evidence of a sentence having been obtained by collusion in the Court of the Bishop of London. The case, in brief, was as follows:—One Mrs. Ailmer died intestate, and Mr. Brown, as her husband, obtained the administration of her effects. Lady Mayo had proved herself to be the daughter of Mrs. Ailmer, and had cited Brown to bring in the administration and show cause why it should not be revoked as unfairly obtained. Brown proved his marriage to Mrs. Ailmer beyond a doubt; but Lady Mayo then alleged that Brown had been married to one Ellen Cutts, who was living at the time of the fact of the marriage of Brown with Ailmer. Brown answered that Ellen Cutts did once make pretensions to him; but that in a suit of jactitation, brought by him against her in the Court of the Bishop of London

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in 1732, she was enjoined silence by sentence, and he was pronounced free from any matrimonial connection with her. To this Lady Mayo replied by plea that the sentence had been obtained by collusion between Brown and Cutts, and desired to be suffered to prove her allegation. Many of the arguments were then used which have been made use of on the present occasion, but the Judge did not, as I understand, reject the distinction between receiving evidence in favour of an injured person and being able to annul the sentence and absolutely deny his authority to admit Lady Mayo's allegation, but only appeared to make choice of the method of stopping the cause in the Prerogative Court till Lady Mayo had applied to the Bishop of London's Court for relief. And in so doing he laid great stress on the note in the margin of Strange's Reports, page 981, where it is said that the Chief Justice of the Common Pleas, in the case of *Prudham v. Phillips*, held a sentence in the Ecclesiastical Court to be conclusive, and would not receive evidence of fraud or collusion in obtaining it. But it is evident from the very able manuscript note of the case of *Prudham v. Phillips* by the late Mr. Ford, whose learning and accuracy are too well known to stand in need of any encomium, that the only reason why Chief Justice Willes refused to suffer Mrs. Phillips to relieve herself by giving a proof of collusion in the Bishop of London's Court was because Mrs. Phillips herself was a party to that suit in the Ecclesiastical Court. So that in truth and fact the decree made in the Prerogative Court in *Mayo v. Brown* appears to have been founded more on the uncertain authority of the note in the margin of Sir John Strange's Reports than on any other precedent.

Now if a suggestion of fraud in a single person, or collusion between many, affords a foundation for a Court, in which causes of property only are decided, to receive evidence that such fraud or collusion was used in obtaining a sentence in another Court which has jurisdiction in cases of property, it becomes necessary *a fortiori* that a Court held for the punishment of criminals should admit evidence to show that a fraud or forgery has been committed in a Court of civil jurisdiction. And there are strong instances in the law of England to show that civil judgments have been regarded not only as of no weight to exculpate in criminal prosecutions but, on the contrary, as aggravations.

The case of *Farr* in Kelyng's Reports is one of many strongly to this purpose. Richard Farr, having an intention to rob the house of Mrs. Stanier, told an attorney that Mrs. Stanier was his tenant, and he could not make her quit his house. The attorney proceeded regularly in a cause of ejectment, and one Eleanor Chadwick, an accomplice with Farr, having sworn falsely that she had served Stanier with a copy of a declaration, judgment was obtained, a writ issued, the woman was ejected, and her house was

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robbed by Farr and Chadwick, who had got legal possession. Farr and Chadwick were afterwards indicted at the Old Bailey, and on proofs given of the facts it was agreed by Lord Chief Justice Hyde, Sir John Kelyng, and Mr. Justice Wild that, though the prisoners made use of the law, and the officers of the law, yet, as this was done *in fraudem legis*, the course they had taken was so far from excusing the robbery that it heightened the offence by abusing the law (Kelyng's Reports, pages 43, 44).

There is a single case on the other side, *The King v. Vincent*, reported in Strange, 481, where it is said that Vincent was indicted for forging a will of a personal estate, and that the forgery was proved at the trial, but that Vincent having produced the probate, it was held to be conclusive in support of the will.

This opinion is said to have been given in 8 George I., and no subsequent case has been quoted in support of it; but numbers of other cases have been quoted by the counsel against the lady at the bar, where the unfortunate prisoners have been found guilty of forging wills, in part upon the same evidence (namely, the probate) on which the very fortunate Mr. Vincent was acquitted.

Among others cited from the State Trials and Session Papers, the case of one *Stirling* has been mentioned, and a stronger to show the absurdity of the doctrine held in *The King v. Vincent* could not well be imagined. One Mrs. Shuter, being known to have money in the funds, Stirling forged a will for her; he gave considerable legacies to several, but to himself he gave £30 only as executor, for it was sufficient for his purpose to get possession in order to make her whole fortune his own. He obtained a probate from the Prerogative Court, and endeavoured to receive her stock at the South Sea House, but was discovered in the attempt and indicted for the forgery; the probate was produced in Court, and, according to the doctrine in *The King v. Vincent*, the sight of the probate should have instantly occasioned the acquittal of the prisoner, for though Mrs. Shuter herself was alive, and appeared in the Court, yet witnesses must have been necessarily produced to prove her identity, and such evidence, according to the doctrine in *The King v. Vincent*, ought not to have been admitted against the probate, which ought to have been conclusive. The prisoner, however, was convicted.

But, admitting for a moment that the case of *The King v. Vincent* was legally determined, it does not seem to apply in the present instance, unless it could be shown that the prosecutor offered to give evidence of collusion in obtaining it, and was not permitted so to do; for it was said by one of the civilians that the probate issued in that case by a decree of the Ecclesiastical Court, and not in common form. If it did so issue, it is to be presumed that such decree was made between parties truly adverse

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till the contrary is made to appear, and the contrary was not attempted to be proved, and it must be confessed, if the parties to the suit in the Prerogative Court were truly adverse, that then the fraud either was or might have been in proof before the original proper Court, and this might have afforded some colour for saying the man shall not be put twice upon his trial for the same offence, though such an argument could only have been specious; for when the question in a Court of civil jurisdiction is will or no will, deed or no deed, and a forgery is detected, the person who committed that forgery must be tried for it in another Court and by another proceeding, or he will never be punished as the law of England directs.

It may be here proper to observe that no one case has been mentioned by the gentlemen on the other side where, in any Court of civil or criminal jurisdiction, a proof of collusion in another Court had been offered by a proper person and not received or rejected. The case of *Hatfield v. Hatfield* in the House of Lords in the year 1727 has been answered by all the counsel who have preceded me, by showing that collusion was not at issue in that case. And in the case of *Kenn*, 7 Coke, so much insisted on by Dr. Winne, there is no mention nor the least hint given of fraud, covin, or collusion. In that case Christopher Kenn had issue Martha by Elizabeth Stowell, but he afterwards obtained a sentence in a cause of nullity against Elizabeth Stowell, as having been married to her *infra nubile annos*, and the marriage was pronounced void in an Ecclesiastical Court. Martha, the daughter of that marriage, in order to make good her title to her father's estate, was afterwards permitted, and probably through some mistake or haste in the Court of Wards, and without hearing counsel, to give evidence that Kenn and Stowell, her father and mother, were not *infra nubile annos* when they intermarried. But according to Lord Coke's Report the Court of Wards agreed that, as the Ecclesiastical Judge had decreed the marriage to be void, his judgment should be credited, although the parties were proved to have been of the age of consent, and although the foundation was false on which the sentence had been grounded, inasmuch as the Court of Wards would not examine into the cause or reasons of the sentence, whether true or false.

From all which nothing farther is to be collected than that a sentence in the Ecclesiastical Court is to have full credit given to it as long as it subsists unrepealed; and that it is not to be overturned in the same Court where it was given, or by any other, on account of error and mistake in law or fact; and this is certain law. But it is to be observed that the parties divorced had been long dead before the suit was commenced, and that there is not the remotest hint or suggestion through the whole case that the Ecclesiastical Court had been deceived by any fraud or collusion between the parties litigant.

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As to the case of *Prudham v. Phillips*, the counsel for the lady at the bar were certainly led into a mistake by the note which I have already mentioned, inserted in the margin of Strange's Reports, page 961, and were not aware of the note in Mr. Ford's manuscript, which is of undoubted authority, and from which it appears that one Mr. Prudham, as a creditor, brought an action of debt in 1737 against the well-known Mrs. Teresia Constantia Phillips. Mrs. Phillips gave in evidence her marriage with Mr. Muilman. Mr. Prudham produced a sentence annulling that marriage in a cause of nullity on account of a prior marriage with one Delafield, and this Mr. Prudham's counsel relied upon as conclusive evidence of the nullity of the marriage with Muilman; and so it was agreed, unless the defendant Phillips might be admitted to show fraud in obtaining the sentence, and so to avoid it, as judgments are daily avoided, by replications of fraud.

“Resolved, on great debate, that the ecclesiastical law was part of the law of the land, and that sentences by their Judges were in matters of spiritual jurisdiction of equal force with judgments in Court of Record and in Courts of Equity. But that whatever objections would avoid a judgment, the same would be sufficient to overturn a sentence in the spiritual Court, but none other. That fraud used in obtaining judgments was a deceit on the Court and hurtful to strangers who, as they could not come in to reverse or set aside the judgment, must of necessity be admitted to aver it was fraudulent. But that Mrs. Phillips had been a party in the cause in the Ecclesiastical Court, and whether she was imposed upon, or joined in deceiving the Ecclesiastical Court, this is not a time or place for her to redress herself.”

Now, although Mrs. Phillips was not in this case allowed to allege that the suit in the Ecclesiastical Court annulling her marriage was collusive, yet the reason on which the Court refused to allow her so to do, namely, her having been a party to the collusive suit, amounts to a full proof when joined with the other doctrine laid down by the Court and related in the case, that any person not having been a party would at all times be permitted in a Court of Common Law or Equity to allege fraud or collusion to have been practised to his injury in an Ecclesiastical Court.

On the whole, therefore, it appears beyond a doubt from the instances which have been given that in civil cases a stranger is admitted in one Court to allege and prove in his defence that a sentence to his prejudice has been pronounced in another Court by means of fraud and collusion, and that a prosecutor in a criminal prosecution is constantly permitted to do the same.

Taking it then for granted that this in general must be conceded, it only remains to inquire why evidence, if necessary, should not be admitted to destroy the force of the sentence in the present case in favour of the Crown and of the public, who were not parties

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to the jactitation suit between Mr. Hervey and the lady at the bar, and yet are interested, if it is a crime to marry a second husband whilst the first is living; or, in other terms, to inquire why a sentence of jactitation of all sentences should be so highly distinguished on account of its worth and stability as to be held forth as an exception to the general rule and as the only species of sentence which ought to be so favoured and honoured by being regarded as conclusive.

That the proceedings in the Ecclesiastical Court are often rather of longer duration than could be wished is not to be denied, and that this principally arises from the number of possible appeals under particular circumstances from the first hearing of a cause to what in general cases may be termed the last is equally true.

When a sentence, for example, given in a cause of jactitation, in which marriage was at issue, has passed through all the stages of appeal, the cause is still liable to be opened *de novo* in favour of matrimony as if nothing had been done. Was this possible prolixity of proceeding, and were these opportunities of appealing an impediment and safeguard against collusion (as one of the doctors has gravely alleged them to be), I do not deny that a cause of jactitation must of all causes stand fairest to be the most immaculate and most free from the stain of fraud. But, when it answers the purpose of parties to collude, it is to be presumed that those who could begin a cause collusively would scruple to carry it on from one Court to another till they came to the end of their journey, if it was necessary so to do to obtain their end? The truth, however, is that several appeals are not absolutely necessary, and that, when there is collusion in a cause, there is either no appeal, or an ostensible one only, which is always subducted within a convenient time, and the gentlemen best know whether an appeal from the sentence relied on in the present case was subducted or not. A sentence in jactitation pronounced in disfavour of matrimony is defined to be transitory, and not final; and this definition seems to be founded, as absurdities sometimes are, on a tenet of religion—the religion I mean is that which, after having been received in this kingdom for a long series of years, was afterwards and now is with reason protested against. In this religion it is maintained, among other condemned doctrines, that marriage is a sacrament, and not to be dissolved. And although it nearly amounts to a certainty that the rites of matrimony are not now quite so strictly regarded in England (as they have been heretofore), and that His Majesty's subjects of almost every description from the lowest to the highest have showed an utter abhorrence of this doctrine of the Church of Rome, yet it is not to be wondered at that the ancient canonists, who were to a man of the religion I have just mentioned, and had the framing of the code ecclesiastical, should so fabricate or bend the law as to render

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it the support of marriage by every possible method, and should lay it down as a maxim that a sentence in a marriage cause should never, in their language, pass into *rem judicatam*, or become a final judgment, but be eternally open and liable to revision and reversal, notwithstanding it may have been established by appeal upon appeal, and even by the Judges of the common law in a Court of Delegates under the King's Special Commission, and afterwards by the Lord Chancellor, who may have refused a Commission of Review (Clarke's Praxis, Tit. 205).

To render the privilege of a jactitation cause, in which the proof of marriage has been attempted but not perfected, still more extensive, the general safeguard against perjury has been entirely taken away in this species of suit, for the publication of the depositions is no obstacle to fresh examinations, and new witnesses may continually be admitted in favour of matrimony, even after the former depositions have been inspected, and without any proof made that such witnesses are lately come to the knowledge of the producer, which is a proof expected and required in all other causes whatever and a rule never departed from.

Clarke in his Book of Practice is express to this purpose, and uses the following words:—*Licet generaliter non admittuntur testes post publicationem, admittuntur tamen in causa matrimoniali sine juramento, quod testes noviter ad notitiam pervenerunt* (Tit. 205). It is allowed, too, in this species of cause that not only the party silenced, but that any other person interested to establish the matrimony may take up the cause in the state in which it was left in the same Court and proceed, as I apprehend, in another Court and invoke or illate the proceedings.

The *pars citata*, or defendant, is also at liberty to go into another Court in a new matrimonial cause, as, for example, in a cause of restitution of conjugal rights—*Licere parti citatæ aut in eodem judicio, aut coram alio judice (non obstante quod citatio emanavit in causa jactitationis) contra actorem instituere causam matrimonialem*. (See Clarke's Praxis, Tit. 195, 200.)

This ambulatory, indeterminate state of a sentence in jactitation must certainly, in the apprehension of any man not a lawyer, be a very improper circumstance to be urged in order to render this species of sentence given in one cause an absolute bar to proceeding to judgment in another cause of a civil nature, and more particularly to make it a bar in a cause of a criminal nature in another kind of jurisdiction. Taking things, therefore, as they are, and having proved the law respecting this extraordinary species of sentence from the books of practice which describe it, can any good reason be assigned why such a sentence should be conclusive in the present case, and should not be revised and revoked, if occasion should require it, in the High Court before which we now are?

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This sentence never passes into a *rem judicatam* or final judgment—it is subject to be revised in any other Court having jurisdiction than that in which it was first given. The Act of James I., by which the marrying of a second husband or second wife, whilst the first is living, is made felony, has by creating the felony plainly transferred that branch of the ecclesiastical jurisdiction, which before punished polygamy, to those Courts where criminals are tried; and to remove even the appearance of any difficulty which might have arisen on the right of the prosecutor to offer the sentence the counsel for the lady have themselves desired leave on her part to bring it before the Court, and have actually introduced it. Can it therefore be possible that this High Court should not think themselves authorised by a complete jurisdiction in every respect, spiritual as well as temporal, to give the prosecutor, on the part of the Crown and of the public, the liberty, under all the circumstances of this case, of offering a proof of the nullity of the sentence, by pointing out from the proceedings themselves, if necessity should require it, the marks of fraud with which they abound; or, what is rather to be expected, to give the prosecutor the liberty of adducing evidence in a more direct manner, both oral and instrumental, to prove the marriage of the lady at the bar with Mr. Hervey, the present Earl of Bristol, by which the collusive proceedings before the Ecclesiastical Court and the truth of the principal accusation will at one and the same time be plainly demonstrated?

Adjourned.

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Third Day—Friday, 19th April, 1776.

LORD HIGH STEWARD—Mr. Wallace, you may proceed with your reply.

Mr. WALLACE—My Lords, I must bespeak your Lordships' indulgence to examine and discuss the great variety of arguments and considerations which the counsel on the part of the prosecution have thought proper to enter into, and submit to your Lordships. I ought in the first place to take some notice of the charge of novelty imputed to myself, and those who assist me, in the attempt to introduce the sentence of the Ecclesiastical Court, before the cause has been opened, or the evidence on the part of the prosecution stated to your Lordships.

It might, perhaps, be thought a sufficient answer to observe that no indictment ever yet has been preferred on this statute where the Ecclesiastical Court had given a sentence upon the subject. The prosecutor of this indictment has had the boldness to set at defiance the proceedings in the Ecclesiastical Court, and, in direct opposition to a sentence pronounced there, to prefer in a Court of criminal jurisdiction a charge of felony; for, although criminal prosecutions are and must be in the name of the Crown, yet in most cases they are carried on by private individuals; and your Lordships particularly know, in the present case, there is a private prosecutor, and one who might have applied on the score of interest to the Ecclesiastical Court to have had that sentence re-examined.

With respect to the novelty of the proceedings, the counsel for the noble lady at the bar would have found themselves standing much in need of your Lordships' pardon if they had not interposed the sentence at the time it was offered. If they had permitted a cause of this kind to have proceeded into evidence (which, from the accounts we have heard, is to be laid before the Court by a number of witnesses, and, of course, must have taken up your Lordships many days in the examination), and after all the sentence had been produced and attended with the effect, which we hope it will have, what would have been the situation of counsel who had suffered so much of your Lordships' time to have been misspent in the examination of parole evidence to facts which could not be admitted against the decision offered to your Lordships?

But in truth it is not new in practice; the case alluded to is not only, as it has been termed, a colour, but a justification for what has been done. It is true it was an ejectionment, which the gentlemen have properly called a fictitious proceeding. It was

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for that reason the sentence was not interposed till the evidence was opened; for till then the defendant is ignorant in what manner the plaintiff intends to make out his claim; but as soon as it was stated that he derived through a marriage which had been examined and decided in the Ecclesiastical Court, the counsel immediately, without suffering evidence to be given, interposed the sentence. In this case there is no occasion to wait for the opening of counsel, for upon the face of the indictment the supposed marriage with Mr. Hervey is stated as the ground of the offence. The crime in the indictment charged is a marriage with His Grace the Duke of Kingston, during the life of Mr. Hervey, to whom the noble prisoner at the bar is alleged to have been before married, and consequently upon the validity of that marriage the question depends. The marriage with the Duke of Kingston was notorious in the face of the Church, under the sanction of a licence from the Archbishop of Canterbury, and in the presence of many witnesses. The supposed marriage with Mr. Hervey was the sole question in the Ecclesiastical Court. That Court has decided against it, and as long as that sentence remains in force the relation of the parties as husband and wife is at least suspended, if not absolutely gone.

The practice every day where one is in possession under a fine, and no claim has been made for five years, is to interpose it immediately. I ventured to do it not long ago in the Court of King's Bench at a trial at bar, where the claimant came out of Wales with as long a pedigree as that country could furnish. When I heard it stated, and understanding that a great number of witnesses must be called to support it, I offered the fine to the Court, before a witness was called, which instantly put an end to the cause. I did not by that incur any censure from the Court or blame from the counsel. I thought myself called upon in duty to inform the Court of it, and a cause which would have lasted three or four days was ended in less than ten minutes.

I trust a conduct designed to prevent your time being mispent upon a fruitless inquiry (for whatever should be the result, yet this sentence, if it has the effect we contend for, must render it totally nugatory and immaterial) will not be the subject of your Lordships' animadversion.

Enough, I hope, has been said in defence of the attempt against the charge of novelty; but an observation was made to create a prejudice against the case of the noble lady at the bar from the conduct of her counsel in this stage of the proceedings to prevent an examination of witnesses as a proof of their opinion upon the merits of the cause. God forbid that any impression should be made against the noble prisoner at the bar from the conduct of her counsel! Your Lordships know that in the forms of proceeding she must throw herself upon her counsel and submit to their

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management, and no mistake of theirs will, I trust, ever turn to her prejudice. I feel a happiness in speaking to a Court incapable of receiving impressions from an insinuation of that kind.

An observation was made upon the form of the sentence which seemed to strike many of your Lordships that, as far as it appeared to the Ecclesiastical Court, the parties were free from all matrimonial contracts and espousals; not positively that they were so; and, therefore, as far as the evidence went in that Court, and no farther, ought the sentence to be regarded. Your Lordships have heard from those that practise in the Courts of ecclesiastical law, from the counsel on both sides of that description, that it is the constant uniform method of drawing up sentences in causes of this kind; that it is a sentence of validity; that it is considered by them as such; but that it is open to further proceedings in that Court; that it falls within the maxim, which was cited to your Lordships upon the other side, which is not denied here, but admitted, nay, mentioned in the very opening of this business; that *sententia contra matrimonium nunquam transit in rem judicatam*; this sentence, being against a marriage, never passes into a definitive judgment of that Court. But does it follow, because it is open to further examination, because other suits may be instituted which may contradict this sentence, that whilst it remains unimpeached, till other suits are instituted, and till a different judgment is given, that the sentence has no effect; that it is the words of the Judge, without having any sort of consequence attending of them?

It is too ridiculous to suppose a suit instituted in the Ecclesiastical Court, where the prosecutor of the suit (or the promoter, in the language of that Court) has obtained the sentence of the Court in his favour, that it means nothing at all, that it is mere waste paper, that he might as well never have commenced the suit. Is it possible in a country where the least idea of justice prevails that this should be the case? On the contrary, the sentence of every Court of competent jurisdiction has been considered in the same way, and every other Court where it has become the subject of debate, till impeached, set aside, reversed, or repealed by the Court that gave the sentence, or by the authority of a Court of appellat jurisdiction, to be conclusive.

Your Lordships have heard from the doctors of the civil law the effect of a sentence in a suit of jactitation of marriage. I took the liberty of stating to your Lordships many cases referring, where the same doctrine had been adopted by the Judges of the common law, and constantly acted upon without an exception. The proceeding is not, as has been contended, in the nature of an action for words or of slander; it has ever been instituted upon some serious claim of marriage, which calls upon the party for an explanation.

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Would it be no objection with a lady to a gentleman paying his addresses to her that somebody claimed a marriage with him? I believe, my Lords, it would at least create a pause in the treaty, if it did not absolutely put an end to it. He certainly would be called upon by the lady or her friends to satisfy them that there did not exist a ground for such report. There is no legal course to be taken but by commencing a suit of jactitation in the Ecclesiastical Court. The proceeding calls in form upon the party who has made the claim to justify it. If a marriage be insisted on, the parties instantly change situations; the defendant becomes the plaintiff or actor, and the original plaintiff becomes the defendant, and is called upon to answer that claim made in the Ecclesiastical Court of marriage, not only to answer it in form, but upon oath. The original plaintiff is obliged on oath to declare whether the allegations of the party respecting the marriage are true or false. The proofs are first made by the party insisting upon the marriage, and the judge gives sentence upon them. The suit in truth becomes, and is admitted by the learned doctor on the other side to be, to all intents and purposes, a matrimonial cause, and the judgment is upon the validity and lawfulness of the marriage. In that light the proceeding in the Ecclesiastical Courts has ever been received and treated.

But suppose the sentence has been received and considered as conclusive evidence, it is contended by the counsel for the prosecution to be only in particular cases, namely, where the person against whom the sentence has been given, or one deriving under such person, has been a party in the suit in which the sentence has been offered in evidence, which is not the present case, as the Crown was no party to the suit in the Ecclesiastical Court.

The distinction may be thought ingenious and plausible, but there is no foundation in law to support it. In the great number of authorities cited to your Lordships there is not the least hint of such a distinction. The rule is laid down in the most general terms, and, without an exception, in the case of *Hatfield v. Hatfield* before the House of Lords. The person against whom the sentence was given in evidence was not a party, nor claimed under any party, to the suit in the Ecclesiastical Court.

No notice was taken of another case which I mentioned to your Lordships, where the person against whom the sentence was given in evidence was no party to the proceedings in the Ecclesiastical Court. It was an action against Mr. Thomas Hervey for a debt contracted by his wife. Mr. Hervey had a judgment in that suit against him. But in a subsequent suit, after a proceeding had in the Ecclesiastical Court, in which it was declared that Mr. Hervey, as far as appeared to the Court, was free from all matrimonial contracts (just as it is in the present case), the sen-

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tence was received as conclusive evidence upon the fact of the marriage, and defeated the plaintiff.

I am not contending that such sentences are to be used as instruments of frauds upon creditors. No; if there is no real marriage, but a man holds out to the world a woman for his wife, and she gets a credit upon that score, he shall never be permitted to say they are not married. Yet where the persons live separate, where no act of his gives a countenance to the demand, there a creditor trusts the wife upon the ground of a legal marriage; there the Ecclesiastical Court deciding upon the marriage is conclusive evidence. That case was acquiesced in, no application was made to the Court, and I believe all that heard it approved of the decision.

A learned friend of mine on the other side, after he had as I thought closed his argument and sat down, rose again to mention a case to your Lordships of *Crutchley v. Robins*. It must have struck him that it would appear a little extraordinary, after so full a discussion, no case had been cited to your Lordships to warrant or give a colour to the distinction attempted. That case, when stated, and the reasons given by the Court which pronounced the judgment considered, will appear not to have the least application to the present. It was a claim of dower by Mrs. Robins upon the estate of Mr. Robins deceased, in Staffordshire. The defendant in that case, the heir of Mr. Robins, pleaded to that claim that she never was lawfully married to Mr. Robins. The only legal mode of trying that fact is by a certificate from the Bishop of the diocese. The pleading between the parties is brought to an issue; it is the office of the Court to direct a writ to the Bishop to certify whether there was a marriage or not; and upon the certificate the judgment is given. Instead of suffering the Court to issue a writ to the Bishop, Mrs. Robins replied to that plea a sentence in the Ecclesiastical Court in a suit, wherein she was by the judgment of that Court pronounced the wife of Mr. Robins; the defendant put in a demurrer, insisting the replication was not admissible. And that was the question before the Court of Common Pleas.

Did the Court of Common Pleas decide that such a sentence is not evidence? No; the Court of Common Pleas determined that by law they could receive no other evidence of the fact than the Bishop's certificate; it was the sole proof which the law in that particular case has required for the decision of the cause, and they could not depart from it. But they went farther in that cause; they told Mrs. Robins that the sentence, though it could not be received there, might be laid before the Bishop, who was to certify to them the marriage. That is the language of the Court of Common Pleas upon the case. The Bishop must certify the marriage; the sentence must be laid before him, and not before

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this Court. Did the Court of Common Pleas decide, as contended, that it was no evidence? No such thing is to be found in the case. All the Court did, or meant to do, was to inform the plaintiff that she had mistaken the time and place to make use of that evidence, that the law had in that case appointed a certain specific proof to be given to the Court, and they could receive no other. The Bishop, who was to examine into the matter, might or might not be concluded by the sentence; the Court must be determined by his certificate.

My Lords, if the Bishop had rejected the sentence, he would have done what no Bishop ever did before; yet the Court must be concluded by his certificate; they could not examine into the proofs. Nay, if the Bishop by fraud had certified a marriage, the Court would have been concluded. So much for that case which has been cited, and which is the only case the industry of the gentlemen on the other side could produce upon this part of the argument.

Your Lordships have been told that by the general rules of evidence in civil cases no sentence or judgment can be received unless in a cause between the same parties, or who derive under them. The candour of the gentlemen on the other side has admitted two exceptions to the rule—first, sentences or judgments, where the proceeding is *in rem*; and, secondly, in causes where the Court has exclusive jurisdiction. I will not state to your Lordships other exceptions to the rule; the two admitted are sufficient; the present case falls within both exceptions, though either would be enough. In the first place, it is a proceeding *in rem*. Marriage or no marriage is the point to be determined. It does not come collaterally or incidentally, but directly, in question, and the decision of which was the sole object of the suit. In the next place, it is a sentence of a Court having exclusive jurisdiction upon the subject. It is admitted that the Ecclesiastical Courts have exclusive jurisdictions in probates of wills, in all testamentary disputes respecting personal estates; and, having decided the question, whether right or wrong, upon true or upon false grounds, it is not competent to any other Court, unless in a legal way by appeal, to enter into the matter; but faith and credit is to be given to the decision of the Ecclesiastical Court. It is also admitted that till the statute upon which the present indictment is founded the Ecclesiastical Courts had the sole and exclusive jurisdiction in matrimonial causes.

But it is contended that a concurrent jurisdiction is given by this Act to the King's temporal Courts. Where is the ground of this notion to be found? Was it the intention of the Legislature to give to the temporal Courts a concurrent jurisdiction with the ecclesiastical? The intention must be collected from the Act itself. In my own apprehension nothing is more clear than that the

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Legislature, at the time of passing this Act, meant to guard and secure the jurisdiction of the Ecclesiastical Courts against innovation from the temporal. The Act is general; that whoever shall marry a second husband or wife, living, the former shall be deemed a felon, and suffer the pains of death. Yet that general enacting clause is restrained by a proviso, which demonstrates the intention of the Legislature, that the proceedings in Ecclesiastical Courts should remain untouched, and the temporal Courts have no jurisdiction in the case. The exception runs thus—Nothing herein contained shall extend to any person or persons that shall at any time of such marriage be divorced by any sentence had or shall be hereafter had in Ecclesiastical Courts, nor to any person or persons—

These provisions show an anxiety in the Legislature to preserve the privilege of the Ecclesiastical Court, and save their judgments from an examination; and so far from giving a jurisdiction to the temporal Courts in such cases, the Act expressly declares that where the Ecclesiastical Courts have given a decision, the temporal Courts must stop. The case is not within the law; it is not permitted to be examined into. It is pretty extraordinary that history gives no account of this Act, or the immediate occasion for passing it. The preamble states that evil-disposed persons, being married, run out of one country into another to places where they are not known, and marry there. If this was the evil meant to be redressed, the case of a person of rank, obtaining a sentence in the Ecclesiastical Court, and acting under the faith of it, can never fall within the description in the Act.

The journals of neither House furnish any light upon this subject. The Act was brought into the House of Commons in April, received some amendments in a Committee there, and sent to the House of Lords; it there also received amendments; and was returned to the House of Commons again in June. But what the amendments were, or whether the provisos were inserted by the guardians of the rights of the Church, as is most probable, or came from the House of Commons, cannot be discovered. Suppose a sentence of divorce pronounced in the Ecclesiastical Court; would it be permitted to any Court, under pretence of fraud, to examine for the purpose of making the parties criminals, when the Act has declared such a sentence shall not be meddled with; and the parties, under such sentences, are excepted in terms out of the Act?

Where a sentence of nullity of marriage is given, it is equally open to future examination in the Ecclesiastical Courts with a sentence of jactitation. If this be doubted, your Lordships, from the abilities and integrity of the gentlemen who assist us, though counsel in the cause, will receive satisfactory information.

A sentence of nullity of marriage is excepted by the words of the Act. And would it not seem extremely inconsistent and

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harsh that, where a marriage is doubtful, and the Ecclesiastical Courts have declared it null, neither party can by a subsequent marriage be in the predicament of a felon; and yet a person, who is by the sentence of that Court declared never to have been married at all, and to be free from all matrimonial espousals, is to be a felon? Such a construction on a penal law would be monstrous.

The intention of the Legislature is to me as clear as language can make it that matrimonial causes should be still within the sole jurisdiction of the Ecclesiastical Courts, and that the temporal Courts should have no authority to examine into their decisions, by declaring, that wheresoever these sentences obtain, the party marrying, whilst they are in force, shall not be a felon, and yet the former marriage, if it were a legal one, is not done away. It is capable of being revived, and a second marriage would be null and void. And upon another proceeding, if the sentence should be in favour of the marriage, either party may commence a suit for restitution of conjugal rights, the first marriage would be established, and a second marriage, pending the sentence, void; yet the party would not be in the predicament of a felon. This is clear from the Act of Parliament; and in this sense your Lordships will give me leave to use it, as showing beyond a possibility of doubt the intention of the Legislature. Where, then, are the arguments we have heard, that the Legislature meant in this case to give the common law Courts such concurrent jurisdiction as to disregard the sentences of the Ecclesiastical Courts? Has the Legislature said so? Has not the Legislature said the contrary in express terms? Wherever a sentence is pronounced, that person is not to be tried in the temporal Courts. Is it competent to any temporal Court? Is it competent to your Lordships, the supreme temporal Court in the kingdom? Awful and great as this Court is, give me leave to say, that the rules of construction are the same as in the most inferior Court of criminal jurisdiction. There is not one law for peers and another for commons in this country. The law is the same for both; it only varies in the circumstances of the trial. The evidence to prove the guilt or innocence of the party is the same in all.

There is no doubt but the temporal Courts may try marriages upon this Act, where no sentence has been given in the Ecclesiastical Court, as they do every day upon titles to lands on ejections. But where a sentence has been obtained against, or in favour of, a marriage in the Ecclesiastical Court, the temporal Courts are concluded by it.

The concurrent jurisdiction which they contend for, if I understand them right, is this—The Ecclesiastical Courts say they, it is true, have a right to try a marriage; but the temporal Courts have also a right to try a marriage under this Act of Parliament. The sentence of the Ecclesiastical Court will not satisfy them; they will have the evidence; and, if they are satisfied with the evidence

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that the Ecclesiastical Courts have thought insufficient, they will pronounce the crime and punish the offender. Can there be any such position warranted by the Act of Parliament?

If the Legislature could have foreseen that in any period it should enter into the head of any man to set at nothing the jurisdiction of the Ecclesiastical Courts, they could not in more positive terms have guarded against it.

If the gentlemen should be able to establish a concurrent jurisdiction in the Ecclesiastical and temporal Courts, they then beg leave to advance a step further, and lay down a rule, which they hope your Lordships will adopt, to entitle them to enter into evidence that judgments only bind in Courts of concurrent jurisdiction, where they are just.

I deny the rule in the extent it has been laid down. Have not the Courts of King's Bench, Common Pleas, and Exchequer a concurrent jurisdiction in civil causes? And was it ever heard, when a judgment of one of the Courts is pleaded in another, that the propriety and rectitude of the judgment can be examined into? Certainly not. The party is permitted only to deny the existence of the judgment. The case of *Sinclair v. Frazier*, lately determined by your Lordships upon an appeal from Scotland, was cited as an authority for this purpose, in which your Lordships ruled that a judgment in the Court of Jamaica should not be enforced, unless it was just. That is, if the defendant in the cause could show it was unjust, no Court ought to lend its aid to carry it into execution. My Lords, nothing is more right or just; but does it apply to the case before your Lordships?

Wherever the aid of a superior Court is wanted to give effect to a judgment of an inferior Court, or of a Court which cannot carry into execution its own judgments, from the parties being locally out of its jurisdiction, that Court whose aid is prayed ought not to give it if the defendant can show the judgment to be unjust; they will give so much credit to the sentence of every Court as to presume it right, unless the defendant can show the contrary. Not long ago an application was made to the Court of King's Bench to enforce the judgment of the Justices at the Quarter Sessions in Lancashire. An Act of Parliament was passed for the inclosure of a common. By that Act, as the public roads are directed to be 60 feet wide, the common was small, situate in a very remote part of the country, where very few people came but those interested in the lands, and they thought that roads of less breadth would very well suffice for the occasions of the country; the Commissioners under that Act of Parliament assigned in the name of private roads what in truth had before been public, and allotted half the dimensions required by the Act. There was an application to the Sessions, who had jurisdiction, by appeal; and they ordered the roads to be opened to the extent the Act

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directed. But when they had done that they were left without the power of enforcing their order. They could not compel a specific execution of it. If they had proceeded for a contempt against the Commissioners by indictment, that would have been tedious and uncertain; the proper method was by an application to the supreme criminal Court of the kingdom, in which the superintendence of all inferior jurisdictions is lodged. A mandamus was moved for in the King's Bench to enforce the judgment of the Sessions. The Court of King's Bench told those who opposed the application—We think ourselves bound to enforce it, unless you can show it to be unjust; convince the Court that the Sessions have done wrong, and we will not lend our aid. And on that occasion a case was cited by the learned Lord at the head of the Court, which happened in the time of Lord Hardwicke; upon a decree of the Court of Grand Sessions of Wales, where a party had removed out of the jurisdiction of that Court, a Bill was filed in the Court of Chancery to enforce the decree of the Grand Sessions; the defendant by his answer insisted that the decree was unjust, and ought not to be carried into execution; Lord Hardwicke was of opinion that if the defendant could satisfy him that the decree was unjust he would not lend his aid to enforce it.

Do we apply to your Lordships for the aid of the Court to carry the present sentence into execution? No; we ask no favour; we demand nothing but your justice. We produce the sentence. We do not ask for your assistance to carry it into execution; it comes in collaterally; and in such cases, whether in the Courts of law or in the Courts of Equity, the sentences of the Ecclesiastical Court have been constantly attended to and been received as conclusive evidence.

But, my Lords, though sentences of the Ecclesiastical Courts have been ever received as conclusive evidence in civil causes, yet it is contended they are not admissible in criminal prosecutions. Is it the genius of this country to attend more to the punishment of crimes than to the administration of justice between the parties in civil rights? Is the distinction founded in good sense or sound policy, that the sentences of Ecclesiastical Courts should not only be received, but be conclusive, in one case, and be no evidence at all in the other? Your Lordships will expect very strong authorities before you listen to such a distinction.

Suppose in a criminal prosecution the property of goods should come in question, and a sentence of condemnation in the Court of Exchequer was produced, is there a doubt of its being received? Where the proceeding is *in rem*, the sentence must of necessity be admissible and conclusive in all Courts, between all parties, and on all occasions, and to all intents and purposes. Without it there would be contrariety of determinations upon the same question, which would be a reproach to the justice of the country.

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I troubled your Lordships with a case from Sir John Strange's Reports to prove that the sentence of the Ecclesiastical Court was admissible and conclusive in criminal cases. That doctrine is abundantly confirmed by a case in the King's Bench four years after *The King v. Rhodes*. What is the answer given to the case? The reporter was a young man, and therefore he is not to be credited, or his notes of cases after his death came into the hands of his executors, who knew nothing of law, who publish every scrap of paper they can find, and give them to the world—to make a volume; so the authority is got rid of by an objection to the youth of the reporter and the manner of the publication.

If your Lordships were inclined to listen to objections of this kind, it would be a curious inquiry at what period of a lawyer's life he can take a note fit to be reported. I confess I am totally unacquainted with it. Should it be, when he is at the bar, a young man, and attending to everything that passes? Should it be, when he is advanced in business? and when the business he is concerned in engrosses his time? If the case had happened later, your Lordships would have been told Sir John was then a man of business; he did not trouble himself about taking notes; they are very inaccurate. If it had been the note of a Judge taken upon the bench, I do not know but it might be said of him what was said of another Judge—Judges are apt to sleep upon the bench.

I had the curiosity to inquire into the circumstances of the report. The case happened when Sir John Strange was about twenty-four or twenty-five years of age; he had been at the bar four years; a note so taken, and preserved to the time of his death, ought not to be slightly treated. The observation of the case being published by his executors would have been spared had the gentlemen gone to the first page of Sir John Strange's book, for they would have found by a preface written by Sir John Strange himself, when between fifty and sixty, that he had collected these cases, and meant the public should have the use of them; that he had been at the pains of selecting those that he thought fit for publication, and of putting them into order. It appears he had given some of his notes to a gentleman, whose servant had clandestinely copied and sold them to booksellers, and lest the cases so surreptitiously obtained should be imperfectly given to the public under the sanction of his name he was at the expense of having his notes transcribed under his own eye, and he says, if they should not be published in my life-time, they will come perfect into the hands of my executors, and, of course, to the public. He practised in the first criminal Court of this country with the greatest honour and ability; he had never heard in his time that the case had been overruled or impeached; if he had, his integrity was such that the case never would have appeared in his

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book, or, if he had inserted it, it would have been accompanied with a note that damned it or threw a doubt on its authority.

There was another objection to this case—that it must have been determined in the time of the dullest alderman that ever sat in that Court. Who, my Lords, determine cases of this kind at the Old Bailey? Not the aldermen. They attend indeed; they are fine pictures, handsome furniture; they grace and adorn the Court, very respectable, of considerable trade; but they do not deal in law. If they ever study law, it is to avoid it, in which they are not always successful. The Judges of the common law of the superior Courts of Westminster Hall decide the questions which arise in trials there.

Your Lordships have been also told that the authority of this case, if ever it had any, was soon put an end to in the year 1753, in the case of *The King v. Murphy*, where the probate of the Ecclesiastical Court was set at nought; it was nothing more than paper and wax, without any effect. The case of *The King v. Murphy* was thrown in by name. A case, the King, and such a one, shows it to have been a criminal cause. But it must be from a state of the facts that your Lordships must discover the application.

I will let your Lordships know the state of that case. It was an indictment for forging the will of one Wilkinson. Your Lordships have many of you heard of the great successes of some privateers fitted out in the year 1746-7, called the Royal Family Privateers; they were very successful, and they got very soon into many disputes in the Court of Chancery and Courts of law. Their wages and prize-money were considerable; wicked men were tempted to endeavour to possess it. A sailor in a remote part of the world is a being not likely to give himself much trouble about money; Murphy, who was prosecuted at the Old Bailey, knowing Wilkinson's title to the prize-money, had forged a will of Wilkinson, had got that will proved, and had received from one Noades, the agent, part of the prize-money of Wilkinson. All went off very well; Murphy spent the money; but in a few months after Mr. Wilkinson was restored to life; he appeared before the agent and demanded his money. Says the agent, we have paid your executor; says he, that is pretty odd; I will satisfy you I have not been dead; and nobody can prove my will till I am dead; I insist upon my money. The fraud was detected; Murphy was apprehended, prosecuted, and convicted.

Would the gentlemen have had him set up the probate of the will at the Old Bailey? Would they have told Wilkinson to go to the Ecclesiastical Court to repeal it? What would Wilkinson, ignorant as he was, say? I have heard of probates of wills of dead men, but never heard of probates of wills of living men before. The jurisdiction of the Ecclesiastical Courts is to grant

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probates of the wills of the dead, not of the living, and therefore the question could not arise.

Another case of one Stirling was mentioned. Stirling found out that a Mrs. Shuter had property in the South Sea Stock, and his scheme to possess it was like Murphy's. He forged a will, got it proved, went to the South Sea House; there he exhibited the probate, they gave credit to the death of the party and to his being the executor, and they paid the money. The woman, who had nothing else to live upon, came to receive her dividend; the clerk says, your executor has proved your will; you must be the ghost of Mrs. Shuter, not Mrs. Shuter herself. She was not to be put off in that way; the company found out Stirling and brought him to justice. He did not say to the Court on his trial, do not believe her; no law says you must take the evidence of a ghost; she must go into Doctors' Commons and rescind this before you believe her evidence. No Court would bear such an insult. The jurisdiction of the Ecclesiastical Court does not attach till the party is dead. There is no such thing as a will for the Prerogative Court to give effect to whilst the testator is living. It was said the crime consists in obtaining the probate; the will has no legal effect without it. It is not necessary to constitute the crime of forgery that the will should be proved; if the will is exhibited as a genuine will, and the officers of the Court (what has happened in many instances) suspect a forgery, they stop the probate; and many have suffered without a probate being granted, the offer to prove the will being a publication of the forgery.

Two other cases, *The King v. Fitzgerald* and *The King v. Carr and Richardson*, were also mentioned to your Lordships. In neither of these cases was any probate produced or insisted upon by the prisoner. One of the gentlemen who cited the cases suggested that answer to them, which was too obvious to be overlooked.

I trust your Lordships are satisfied there is no ground in reason or authority for the distinction attempted between civil and criminal causes in the admissibility and effect of the sentence of the Ecclesiastical Court.

I am now, my Lords, arrived at that point to which the whole artillery seems to be directed, that the sentence was obtained by collusion. Your Lordships have been told that a judgment by collusion is *fabula, non judicium*; wax, paper, ink, anything that you will, but not a judgment. The Judge does not act, the Judge is imposed upon; it is of no effect whatever; in no Court, in no light, upon no occasion, can the most ingenious imagination suggest a case in which collusion does not affect the transaction, and, being once proved, destroys it from the beginning, and as much annihilates it as if it had never existed. This your Lordships have been told is the clear settled law of every Court.

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I must beg leave to deny the doctrine in the extent it is contended for, and to insist before your Lordships that collusion cannot be averred against this sentence, either upon the principles of the common law or the provisions of any statute. By the common law of this country proof of collusion in some instances was permitted to rescind transactions; the simplicity of the common law, calculated for more honest times, was not equal to all the arts of injustice which ingenious wickedness had produced.

By the principles of the common law the person permitted to rescind a transaction on the score of fraud or collusion must have an interest vested at the time. This is expressly laid down by the Court in *Twyne's* case, reported by Lord Chief Justice Coke, where goods are unjustly taken, and sold in a market overt by fraud; to change the property, the true owner may retake them; so where a creditor prosecutes his debtor to judgment, and the debtor sells his goods to a person knowing of the judgment, with a view to defeat the execution, the goods may notwithstanding be taken by the creditor. In both cases an interest was vested at the time of the fraud.

Many statutes have been made to suppress fraud; in Henry IV.'s time, in the different reigns of the Edwards, and, last of all, in the time of Queen Elizabeth, the main object of which was to enable persons who became interested subsequent to transactions founded in collusion and fraud to impeach and rescind them.

It has not indeed been expressly insisted that by the common law, independent of statuteable provisions, all fraudulent judgments were void, and that it was competent to any person to defeat them. The authorities I have cited, and legislative declarations upon the subject, prove the contrary. The statute of 9 Henry VI. c. 11, has already been mentioned; from thence it is clear the certificate of the Bishop, however collusively or fraudulently obtained, was conclusive between the parties; and in the case of bastardy a provision is made against such certificates in future. But in other cases, as in marriage, to this day, and also before the Reformation upon the parties being of a religious order, the certificate was conclusive, notwithstanding any fraud or collusion. Collusive judgments upon penal statutes to protect offenders frequently occur in practice, and when they are insisted on the plaintiff has a right to aver such judgments to have been obtained by fraud and collusion. This does not arise from the provision of the common law, but from an Act of Parliament made in 4 Henry VII. c. 20. The whole statute is material to be attended to. The title of the Act is, "Actions popular prosecuted by collusion shall be no bar to those which be pursued with good faith." It recites that if an action popular be commenced against an offender by good faith, then the same offender will delay the action either by non-appearance or by traverse; and hanging the same

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action, the same offender will cause like action popular to be brought against him by covin for the same cause and offence that the first action was sued; and then by covin of the plaintiff in that second action he will be condemned either by confession, feigned trial, or release, which condemnation and release so had by collusion and covin pleaded by the said offender shall bar the plaintiff in the action sued in good faith. It is therefore enacted that in future the plaintiff suing in good faith may aver the former recovery to have been by covin and collusion; but no such averment is to be received after a trial on the point of the action or on the covin or collusion.

Here your Lordships find the origin of averments that judgments on penal statutes were obtained by collusion. This Act affirms the principle of the common law, that none but persons interested were entitled to rescind judgments on the ground of collusion. A penalty given to a common informer is not vested in any individual till he commences the action, and consequently he could not aver collusion in a former judgment. Such judgment was not then *fabula*, or waste parchment, but of such effect and conclusion as called for an Act of Parliament to remedy the mischief.

There can be no greater authority to prove the common law of the land than a Parliamentary declaration upon the subject; this Act furnishes a most explicit and satisfactory one. Your Lordships will not suppose an Act was made to remedy a mischief or supply a defect which did not exist. If your Lordships refer to the Acts of those days you will find them drawn with great precision and accuracy, and with great knowledge of the subject. I will not say so much for the Acts of the present time.

This Act must evince to your Lordships that collusive judgments in Courts of law bound in collateral suits. Is it then to be wondered at that there was no provision by the common law respecting fraudulent sentences in the Ecclesiastical Courts, which had the sole and exclusive jurisdiction in themselves? But it does not follow that collusive practices are to have effect or the parties go unpunished.

A power is incident to every Court to prevent its proceedings from being made the instruments of fraud and iniquity, and to punish the persons concerned in the attempt. It may be done upon the information of any one, interested or not interested. The Court is called upon for its own honour to examine into the business.

Your Lordships have been told that the Crown cannot get at the collusion; that the Ecclesiastical Courts will not attend to the application of the Crown. If that were the case it would not follow as a necessary consequence that the Crown should be admitted to allege collusion here. But has the Attorney-General surmised

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to the Ecclesiastical Court that there has been such an imposition put upon them as is insinuated? Has the Judge of the Ecclesiastical Court told the Attorney-General I cannot attend to the suggestion? No application has been made to the Ecclesiastical Court, either on the part of the Crown, or by the real prosecutor in this case, or any other person, though the Duke of Kingston and the noble lady at the bar lived together five years under the sanction of a marriage solemnised with the Archbishop's licence, in the presence of friends, and known to the world. Does the prosecutor say he is actuated by motives of justice, and allege the supposed collusion newly discovered?

A case happened in the Court of King's Bench, which is known to many of your Lordships. Mrs. Phillips had married Mr. Muilman. Mr. Muilman had got rid of that marriage by a sentence in the Ecclesiastical Court by proving a former marriage with one Delafield. It was then the lady's turn; she meditates getting rid of Delafield's marriage by proving that Delafield at the time he married her had another wife, and so the lady was to fix herself upon Mr. Muilman in order to give effect to her scheme. An action was brought for a real demand against her in the Court of King's Bench by a brewer, who had got a note from her for a valuable consideration. The intent of this was to create a rumour that Muilman and she were married. They might have brought this and a thousand such actions, and no verdict given could be evidence against Mr. Muilman; but when Mr. Muilman heard of this proceeding, and the purpose of it, though it could not affect him, he applied to the Court of King's Bench, not as a party in the cause, but informed the Court that such a proceeding was had by collusion, that it was an abuse of the Court, and ought to be rectified. Lord Hardwicke was then at the head of that Court; he considered it as a high contempt of that Court; he attended to the application of Muilman. An objection had been made by counsel that Muilman was not to be heard. What! said Lord Hardwicke, to inform the Court of a contempt is he not to be heard? Any person as *amicus curiæ* may inform the Court of a contempt that has been committed. The Court ordered the record to be taken off the file, and punished the parties. If the present sentence was by collusion, the Ecclesiastical Court would erase from their records the memorial of the transaction at the surmise of an *amicus curiæ*, and would not the Ecclesiastical Court have thought themselves honoured with such an *amicus curiæ* as His Majesty's Attorney-General?

Great, and perhaps deserved, commendation was bestowed upon the Marriage Act, though I really confess I did not discover the application. Your Lordships were told that every woman of easy virtue and of indigent circumstances before that Act had an immediate receipt for the payment of her debts by getting

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married at the Fleet. Has the Marriage Act been attended with such beneficial consequences to make all women virtuous and all women rich? If that be true, it has much greater merit than I conceived belonged to it. Did a Fleet marriage discharge the woman from her debts? The only change it made in her situation was this, when married she goes to gaol in company with her husband, whereas if single she must go alone and trust to the company she meets there. And as to future debts she was not liable, because she was a married woman; and at that time the marriage ceremony, if performed by a priest, was valid. But is there anything in the Marriage Act which says that a woman who now marries shall not run into debt? It would be very happy for many husbands in this country if there could have been an effectual provision of that kind. Before the Marriage Act a woman by her marriage in the Fleet was not liable to future debts; a woman now by her marriage in the church is not liable to future debts. Has the Marriage Act made it a difficult matter in this country to be married? Are there many obstacles in the way? Is there any delicacy in surrogates in granting licences? In truth, it is as easy to get married in a church as before in the Fleet. Suppose a marriage by banns at a distance from London; the woman comes here and runs in debt; does anybody in London know of her marriage, though it was in a church? She has as much power to run in debt since the Marriage Act as before, and as exempt from the payment.

Your Lordships are told that a man and woman may to civil purposes and to civil duties, by a collusive sentence of this kind, become separated, and no longer husband and wife; but to all the public duties they are husband and wife. They cannot absolve themselves from public duties; there is no power upon earth can do it but the Legislature of the kingdom; and that the noble lady at the bar is free to all civil purposes, but to all criminal purposes she is a wife.

I wish the gentleman who used this argument had explained himself upon the subject, for I protest to your Lordships I am to be informed that there are other public duties by husband and wife to be performed but those in a state of cohabitation. I have no idea of any public duties which the State can exact from a husband and wife in any other situation; and yet, my Lords, nothing is more clear than if a man and woman cohabit together as husband and wife after a sentence like the present, and whilst it remains in force, they are punishable by ecclesiastical censures.

Are the public duties alluded to the injunctions found in the Act of Parliament that no man shall take another wife, or any woman another husband, living the former? The Act does not mean to punish all such acts; for in the first place the Act says that it is competent to any man, without becoming a felon or

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the object of punishment by the Act, to marry a second wife, provided his first wife is beyond the seas for seven years together, though the husband knows she is living; and yet the second marriage is void, and the husband may be punished in the Ecclesiastical Courts, but not in the temporal.

Suppose a gentleman from Ireland, for instance, should be civil enough to leave his wife, and resides seven years in England; though he hears from her by every packet, though he writes to her by every packet, he may marry a woman in England without offending against the Act of Parliament. It would be the same if a person living at Dover could prevail on his wife to go and reside at Calais for seven years, he might marry another woman at Dover without any peril from this law, though every vessel brought him accounts of her good health. Is this, then, that great public duty which the State so rigorously exacts, that none of its subjects shall marry a second husband or wife, living the first?

It is well known that a divorce for adultery does not dissolve the bonds of matrimony; the relation of husband and wife still exists, and neither party can marry again; and yet the day after that divorce is pronounced she can marry any man she pleases without offending against this law. It is not then in this Act of Parliament we are to find the public duties which the State exacts from a husband and wife, for in many cases a second marriage is not punished, or even condemned by it.

Possibly the gentleman may urge that a wife's residing abroad for seven years may be by collusion to give the husband an opportunity of marrying again without committing felony. In short, if your Lordships yield to this objection of collusion, it is impossible to foresee to what extravagant lengths you may be carried in support of the proposition, that the noble lady at the bar is to all civil purposes single, but to all criminal purposes a wife. The case of a person who committed a fraudulent act of bankruptcy, on which a commission issued, and for a concealment of part of his effects he was tried and executed, has been mentioned. The case, so far from maintaining the proposition, is an authority against it. The collusive act of bankruptcy was deemed equivalent to a real one; it bound the bankrupt to all civil and criminal purposes; it subjected his property to be seized for the benefit of his creditors; it subjected his person to the punishment ordained by the bankrupt laws; there is no distinction made between civil and criminal purposes.

Suppose a commission of bankruptcy issuing fairly upon a real act of bankruptcy, and a concealment by the bankrupt; and let me suppose further, which is not an impossible thing, that the commission by collusion between the assignees and the bankrupt is superseded, as having improperly issued, by an order of my Lord Chancellor, and an indictment should be afterwards pre-

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ferred for the concealment, would any Judge suffer a man to be tried as a felon under these circumstances on a suggestion of fraud in superseding the commission? Certainly not. I am persuaded every Judge, who now assists your Lordships, would tell the prosecutor he had mistaken the place to examine the fraud; that he ought to have applied to the Court of Chancery, which has exclusive jurisdiction in bankruptcy; and direct the prisoner to be acquitted.

Fermor's case, in Lord Coke's Reports, was cited to your Lordships to prove that acts temporal and ecclesiastical may be avoided for collusion. Does that learned Judge say where such acts are to be avoided? No; but, my Lords, to illustrate that passage he refers to a case reported in Lord Chief Justice Dyer's Reports, and there it appears that the act of the Ecclesiastical Court, which was granting an administration, had been repealed in the Ecclesiastical Court for collusion. If I wanted authorities to add to those I have cited I would borrow this to put into the number, because it is a direct proof that the Ecclesiastical Court have a power to set aside their own acts for fraud.

A case of *Lloyd v. Maddox* was cited from Moore's Reports to prove that the Ecclesiastical Courts had a power to examine into the collusive means of obtaining a judgment in the temporal Courts; and shall not, say the gentlemen, the temporal Courts take the same liberty with the sentences of the Ecclesiastical? The case need only to be stated to show the fallacy of the argument. A person claiming a legacy sues in the Ecclesiastical Court, the proper forum for the recovery of that demand. The defendant in answer says, I have nothing to pay you with; such a one, a daughter of the testator, has sued me in a Court of law for debt; has recovered a judgment against me; I must pay that debt; I cannot pay your legacy, unless I pay it out of my own pocket, and nothing can be more unjust. The executor is to administer the effects as far as they go, but not to pay the debts out of his own pocket. The legatee in answer said the judgment was by fraud, and the temporal Court would not prohibit the Ecclesiastical from examining into the matter. This is not only within the principle of the common law, the legatee having an interest at the time of the fraud committed, but falls within the statute of Queen Elizabeth, which ordains that every judgment in any temporal Court by collusion is utterly null and void, as if it had never existed; it is void against every person having an interest; it is void by force of the statute against the Crown demanding a forfeiture.

A learned friend of mine, who spoke in the cause, and who did me the singular honour of attending to me, not for what I said, but for what I omitted, observed to your Lordships that I had avoided entering into the effect of fraud and collusion upon the

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sentence, unless by citing the case of *Hatfield v. Hatfield*. I knew it would fall to my share to trouble your Lordships upon that subject, and to avoid a repetition I contented myself in that stage of the business with relying upon the case of *Hatfield v. Hatfield*, which appeared to me alone sufficient to answer every argument upon collusion.

It is pretty singular that as *Hatfield v. Hatfield* was a case in equity, and two of the most eminent equity counsel in this kingdom appear for the prosecution, that neither of them thought fit to grapple with that case; they found in the principles of the Court of Equity that it was not to be answered, and therefore prudently passed it over to those who should think fit to engage with it. A woman claimed £40 a year, which was vested in a trustee for her use; but there was another devise of an annuity of £10 a year out of lands, and a legacy directly given her. The former husband released to the heir-at-law of the second husband, who had made these provisions for his supposed wife; she files her bill; the first husband in his answer states all the circumstances of their marriage, the time, the place, the minister, and the persons present, to avoid the effect of the release. A suit of jactitation is instituted in the Ecclesiastical Court by collusion with the second husband, after proof of the marriage in the cause in the Exchequer, and she is declared a separate woman and the widow of the deceased; the Court of Exchequer received the sentence as conclusive evidence. On an appeal to the House of Lords the decree is affirmed.

If it had stood merely upon the printed cases in the House of Lords I should conceive your Lordships could not have entertained a doubt, but the case is mentioned in Sir John Strange's Reports, when he was not a young man, and the ground of the determination is stated to be that the sentence was conclusive. The case is mentioned also by Mr. Viner in his abridgment, where he adds that the House of Lords held that a sentence in the Ecclesiastical Court could not be impeached, though the proceedings were faint and by collusion. This clear and direct authority is to be got rid of and avoided in this manner: Mr. Viner is a nonsensical writer; you are not to give credit to what he says. I should have hoped that gratitude to Mr. Viner's memory would have repressed that observation. He has shortened the hours of the labour of lawyers, and more particularly of those who are in great business. But to cases in themselves irrefragable, with decisions upon the very point, answers cannot be given by argument, unless your Lordships will dignify those observations with the name of argument.

The case of *Lady Mayo* was cited from Doctors' Commons, which is very material to the cause now before your Lordships. It was a case of fraud and collusion, discovered in the Prerogative Court upon the appeal, which had been practised in the Con-

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sistory Court of the Bishop of London. The fraud was apparent; he that ran might read it. But what said the Judge of the Pre-rogative Court? You must go into the Consistory Court, where the fraud was committed; I can give you no relief. There the collusion must be gone into, there redress may be had, there the honour of the Court will be vindicated. This is the opinion of a living Judge of high character for his abilities and integrity; a greater man perhaps never sat at the head of that Court.

Your Lordships have been pressed to give a more favourable attention to the wishes of the prosecutor, as the present is a criminal proceeding. Is it the principle or genius of this country to be more active to find out and punish crimes than to give effect to civil rights?

There is a benignity in the laws of this country to the frailties of mankind; the Judges are attentive and zealous, that the civil justice of the country be strictly administered, and will not suffer any contrivance, chicanery, accident, or neglect to defeat it; but in criminal prosecutions they are humane, they make great allowances, and are not overanxious to discover criminals. This observation is verified by daily practice. In a civil cause, if the trial comes on before the plaintive expects it, if a witness be out of the way, if the verdict be in favour of a defendant contrary to the evidence, the verdict is set aside, and a new trial ordered and justice done. But in a criminal prosecution, if the verdict be in favour of the defendant, though it arises from the absence of a witness, or from any other accident, or it be given contrary to the clearest and most satisfactory proof of guilt, though not one of the jury can show his face without a blush, yet the verdict stands, and a new trial is never granted; it was even denied in perjury committed in the time of King William, where the defendants had the wickedness to corrupt the witnesses for the prosecution to keep out of the way; for whenever and by whatever means there is an acquittal in a criminal prosecution the scene is closed and the curtain drops.

I cannot, my Lords, sit down without reminding your Lordships that in the course of the argument have been cited many determinations in the temporal Courts by Judges who had no partiality to the ecclesiastical jurisdiction, acknowledging their authority, and declaring *unâ voce* that in all cases where they have an exclusive jurisdiction the sentence is final and conclusive. There is not an exception to be found in the books. Some of these declarations were made when the Judges of the temporal Courts were exceedingly jealous of the Ecclesiastical, and when they were even in a state of warfare.

Does the present case call upon your Lordships to break down the boundaries which the constitution has fixed between the temporal and Ecclesiastical Courts, or to invade those rules of decision

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which have been transmitted from the earliest of times? Is there an authority to warrant your Lordships in taking so extraordinary a step? Is it expected that your Lordships are to be more jealous in finding out crimes and punishing offenders than your ancestors? and to accomplish those purposes that you will disregard the authorities of the law, the practice of ages, and the spirit of the English constitution? If the matter, instead of being clear in favour of the noble lady at the bar, as I conceive it to be, had been only doubtful, I am persuaded your Lordships would pronounce an acquittal.

It is the duty and practice of every Judge in a criminal prosecution to let the jury know that if there hangs a doubt in the cause they ought to give the turn of the scale in favour of innocence and acquit the prisoner. Can your Lordships, after an argument of three days, in which so many respectable determinations in favour of the ecclesiastical jurisdiction have been cited, lay your hands upon your breasts and say here is no doubt; the sentence of the Ecclesiastical Court, upon the faith of which and by the advice of a person of the first knowledge and abilities in the ecclesiastical law the noble lady acted, is a nullity and of no avail, and that she has intentionally violated the laws of her country and become a felon? I will not permit myself to suspect any one of your Lordships can entertain such an opinion; and I sit down with the most perfect confidence that by your Lordships' judgment the noble lady at the bar will be dismissed from any further attendance upon your Lordships.

LORD HIGH STEWARD—A noble Lord asks, whether in that case you cited, where an action was brought against Mr. Thomas Hervey, the Court upon hearing the sentence in the Ecclesiastical Court refused to proceed further in it; or whether it was that the cause was then depending in the Ecclesiastical Court?

Mr. WALLACE—I will give your Lordships an account from my memory, confirmed by a note taken in a subsequent cause; and if there is any doubt upon the facts, I am happy to acquaint your Lordships that you will have much better information upon the subject from the noble Judge who tried the cause. Mr. Hervey and the lady had lived separate several years, during which time a creditor, who had furnished her with necessaries, brought an action against Mr. Hervey; he denied his marriage; there had not been a sentence at that time in the Ecclesiastical Court; the Jury were satisfied with the evidence of the marriage, and found a verdict against Mr. Hervey. Another creditor, who had furnished necessaries for the lady afterwards, brought his action against Mr. Hervey, and was provided with the same evidence which had satisfied the former Jury; but between the time of the former trial and the trial of this cause a suit of

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jactitation had been instituted in the Ecclesiastical Court by Mr. Hervey against the lady, and a sentence pronounced in his favour, which was offered in evidence. The learned Judge conceived himself bound by that sentence as the judgment of a Court of competent jurisdiction. There was no imposition upon the creditor, no occasion for an alarm by the decision, the debt was not contracted during cohabitation, no act of Mr. Hervey's had induced the creditor to furnish the necessaries to her as his wife, he renounced the relation; the plaintiff gave credit upon the marriage itself, and therefore took upon him to satisfy the Court that there was a legal marriage. The sentence of the Ecclesiastical Court had determined the point; the Judge apprehended that the question was closed, and that he was bound to give faith and credit to the sentence; and the plaintiff failed on account of the sentence, though it was afterwards reversed upon an appeal.

Dr. CALVERT—My Lords, the question arising upon the sentence which has taken up so much of your Lordships' time seems now confined to a narrower compass than we at first apprehended. When the counsel for the noble duchess at your Lordships' bar offered the sentence in the Ecclesiastical Court to be read as conclusive evidence, it was desired by the counsel on the other side that the rest of the proceedings in that cause might likewise be read. This raised a belief in us that exception would be taken to the nature of this sentence in particular as differing from sentences in other matrimonial causes. We apprehend it would be said, as indeed it was by some of the counsel on the other side, that a proceeding in a cause of jactitation, when the issue of it was pronouncing for the jactitation, and the defendant enjoined silence (let the proceeding in that cause have been what it might), would not amount to a positive decree against a marriage, but it would be merely a dismissal of the party; that it would amount to no more than this, that nothing had been proved for the present, and that the judgment never would become decretal.

I take it to be a mere mistake to speak of proceedings in such a cause in that way; but, however, we have it now, as I understand, in concession from the counsel on the other side, and we are perfectly agreed about the nature of the sentence. It has been allowed, it is as complete a sentence against a marriage as if it had been pronounced in a cause of nullity of marriage. A concession of this sort coming from the counsel on the other side, your Lordships will see, must leave them much embarrassed—first, by their own concessions of the effects similar judgments have had in other questions; and likewise by the Act of Parliament, upon which alone this prosecution can be founded.

It is conceded that some judgments of the Ecclesiastical Courts are final as to matrimony; but if they concede that some

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are, there is now remaining no objection to this in particular. Your Lordships will see how much this is supported by the statute on which the prosecution is founded, because the exceptions out of that statute go directly to those sentences with which it is now allowed this is upon a footing. Can it, therefore, with any propriety be now urged that it ought not to be received as conclusive, because there is a possibility of setting it aside? This seemed astonishing to the learned gentleman who spoke first on the other side, that, as it is allowed that the Court who passed that sentence could at any time upon proper evidence reverse it, it should be urged in this judicature as conclusive upon your Lordships. Many instances have been given where sentences not more final or irrevocable than this have been allowed in the common law Courts. If in a cause of nullity a marriage be pronounced to be void, it would not be contended a moment but that such a sentence is within the exception of the Act, and no person marrying again after such a sentence could be an object of punishment under that Act. It is surely, therefore, a very considerable concession, and sufficient to justify the reliance we have upon it, that it is a positive and direct sentence against the marriage.

The ground of some of the exceptions out of the Act of Parliament seems to be the notoriety of the state of the party, which leaves no room for imposition on the person with whom the second marriage is contracted, for the Act has not in view merely the punishment of the offence as against morality, because the exceptions are such which allow in many cases a second marriage, though the first is really in force. The object, therefore, of the Act of Parliament seems to be this, that there should be no deceit put upon the person; it is expressed by the preamble in these words—"Whereas many persons going from one county to another, or into places where they are not known, marry again; therefore be it enacted." But when there has been any proceeding of this sort, when there has been any question litigated in the Ecclesiastical Court relative to that marriage, and when the sentence of the Court is against that marriage, I believe it is no strain of the interpretation of that Act to suppose it is one of those cases in which no prosecution of this sort ought to be carried on.

The variety of instances that have been produced to show that whenever any sentence of this sort has been produced it has been constantly attended to by all civil jurisdictions will not bear a contradiction; nothing can be more clear. To all the cases that have been quoted on our side I do not apprehend that any answer has been given to affect their authority; what is more, there has been no case cited on the other side. Therefore, if a series of authorities will establish any point, it is to be conceded that in all civil cases a sentence thus pronounced by a

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Court having a competent jurisdiction, where the question has come before that Court, marriage or not marriage will be received; the question then will come to this, if it can be established that in civil suits it would be received, ought it not to have the same effect in a criminal prosecution?

For that purpose there have been cases cited to your Lordships, that of *The King v. Vincent*, where there was a prosecution for a forgery, and the probate was received as conclusive evidence against that forgery. In answer to that it was urged only that it was a case that was too strong, and they could not give credit to the reporter. That answer seems by no means satisfactory, especially as it does not meet with support from any subsequent authority, since none has been quoted that comes up to the point. Two or three cases have been mentioned; but when they are considered, and the circumstances they were attended with, your Lordships will find it does not appear that they come up to the case in question. In two of these instances the supposed testators were living. My Lords, it was a gross imposition and the whole proceeding a mere mistake, and nothing more. The testator came into Court to give evidence. To be sure, a probate under these circumstances could not be attended to; it could not be a probate at all; nor could it be contended that the probate of the will of a living person could be received in evidence. I know the treatment it received in the Court of Prerogative in that case, where Stirling was executed for a forgery. I inquired to see how that stands, and I do not find there were any proceedings to reverse or revoke the probate; the thing was too absurd to require a judicial disquisition. I was informed a pen was drawn through the probate, and on the margin was written the word "void." There were two other cases mentioned of indictments for forging wills, where it was said that there was a probate existing; but it does not appear throughout these cases that any mention was made of the probate at the trial, or that the exception was taken for the prisoners. We pointed out to your Lordships the great inconvenience that would arise from going on to inquire into questions of this sort in two different judicatures. It was asserted—

A LORD—Whether the scratch with a pen through the probate in the case of *Stirling* was done by any order of the Court?

Dr. CALVERT—Not by any judicial order, I believe. I apprehend it never came judicially before the Court. By whom it was done I know not. I am not acquainted with that. It was asserted by the counsel on the other side that no decision of a civil nature could be applied to any criminal question. It was asserted, but I did not find that it was supported by any principles or authorities. We, on the other hand, did submit to your Lordships that the inconveniences arising from such different

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inquiries might be extremely great; for if they produce different judgments upon the same point, the persons who should be affected and interested under them, under such a predicament, might find it difficult to know what should be their duty. We pointed out that in case the sentence now in question remains in force, which I trust it will, notwithstanding any judgment that may be passed in this Court, yet if you should proceed to censure the person thus separated from the supposed former husband, from this contrariety of judgments the greatest confusion would arise; for you would censure the person for marrying again, as being the wife of that husband, of whom it had been directly in issue and determined that she was never the wife. This, my Lords, appears to us a very considerable absurdity. The only answer I heard to that was rather avowing the inconvenience than removing it. When it was asked in what predicament would a woman stand under the circumstances, it was said she would be a wife to criminal purposes, but not so as to civil considerations. What the distinction meant I confess I do not well understand; but it was said the noble lady at the bar should be considered as a wife to all criminal purposes, because persons cannot absolve themselves from their public duties. I never understood that with regard to matrimony any party could absolve himself from his private duties neither. I always understood it, as far as his own act could affect it, to be an indelible obligation. But what are the duties to the public which a person in this situation should be answerable for? A woman by law separated from, and even pronounced not to be the wife of, the supposed husband, and to whom she cannot return, I do not know what duties there are that she should be answerable to the public for. It is contended that of not marrying again; but this is expressly contrary to the meaning of the Act itself, which provides that in many cases, even where the former marriage remains in force, yet a second marriage shall not be criminal; as in the case of a separation *a mensa et thoro*, there is no doubt that the parties remain man and wife as much as if they had never been divorced; nay, it is so merely a temporary separation, that there is no occasion for a judicial proceeding to bring them together again; for whenever the parties choose to cohabit they may live together, and are as completely man and wife as if no separation had happened. It has been observed that some inconveniences which were removed by the late Marriage Act might be introduced again under these suits of jactitation. It is certainly somewhat unintelligible how these suits could be applied to those purposes. The grievance mentioned is this, that single women contracting debts did, before that Act of Parliament, procure themselves to be clandestinely married to persons with whom they never intended to cohabit, but merely with a view fraudulently

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to protect themselves against their creditors. Now, can it be argued that by going into the Ecclesiastical Court and obtaining a sentence in a cause of jactitation that end would be answered? What! when a woman wants a husband to protect her from her debts, shall she get herself fraudulently released from her husband? It seems it would have quite a contrary effect, and cannot answer the purpose for which it would be intended. If any of the excellent regulations made by that Act are in danger of being infringed upon by undue practices, it were worthy the Legislature to attend to it and provide against them; but a Court of justice cannot for such reasons depart from ancient and established modes of proceedings. And in this case these considerations ought not to have the least weight, because there is not any ground for the apprehension. In the proceedings in this criminal Court, therefore, your Lordships ought to receive these sentences upon the very same principles, or indeed broader, than a civil Court; for who shall pretend to say that in a civil question parties may avail themselves of such a suit? But where a person is brought merely to answer for a crime, and for the purpose of punishment who shall say that it is consonant to the principles of law that such a defence should not avail? So rigorous a determination in criminal cases has not been supported on any authority or established on any principle. Upon the authorities, therefore, which have been quoted, and which remain unshaken and uncontradicted, we do submit to your Lordships that these two points are well established. But it has been said that we are now arguing for what is not open to be considered on the general principles of law; because this question has been already decided by the very Act upon which the prosecution is now depending; for when an Act of Parliament makes some exceptions, the true interpretation of that Act is that all cases which are not within the exceptions are within the prohibition.

Supposing that to be a good principle of interpretation, yet it may very well and with propriety be contended that the case that is now offered—I mean the sentence pronouncing against this marriage in a cause of jactitation—is within the exceptions of the Act of Parliament. The two exceptions are that it shall not extend to any person who is at the time of such marriage divorced by any sentence had in the Ecclesiastical Court, or to any person where the former marriage hath been, or hereafter shall be, by sentence in any Ecclesiastical Court, decreed to be void and of no effect. It will be difficult to explain the latter words connected with the provision in the former clause without taking in the very sentence which is now under consideration. The general words in the first clause are that it shall not extend to those cases in which at the time of such marriage the person was divorced by any sentence of the Ecclesiastical Court.

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Now, the word "divorce" has always been applied, not only to separations *a mensa et thoro*, but to divorces *a vinculo matrimonii*; the first clause, therefore, under the general word of divorce seems to take in both these cases, whether it be a temporary separation for adultery or cruelty, or whether it be a divorce *a vinculo matrimonii*. If that clause applies to these two cases I would ask what is the meaning of the second that speaks of sentences declaring a marriage null and void to all effects? A sentence pronouncing a marriage null and void and of no effect is the same thing as a divorce *a vinculo matrimonii*, because, if the marriage has ever been a true and legal marriage, it is well known that no judicial power in this kingdom can put an end to it. In order, therefore, to give every part of this Act some meaning, it ought to be understood that the Legislature by those general words must mean any sentence whatever by which the Ecclesiastical Court should have pronounced that there is no marriage, or that a marriage is void, it being the purport and the general object of this Act to save not only the jurisdiction of the Ecclesiastical Court (that is not what I am contending for), but it is to save the innocence of the persons acting under such sentences. Because where that question has been agitated in a public Court (for the Legislature does not suppose, as some of the counsel on the other side have unwarrantably supposed, it to be a private and clandestine transaction; but) the constitution supposes every Court to be open and public, and proceedings there to be before the face of the world; everybody may see and know them, if they please; and when there has been this public sentence of any constitutional Court, the meaning, the equity of the Act must be that any one of these sentences shall justify the party acting under it. To make a distinction between a cause of nullity and a cause of jactitation, I apprehend, can be founded upon nothing but not considering the nature of the proceedings; because I can hardly put a case, which would be a proper subject for a suit of nullity, but it might likewise be proceeded to the same effect in a suit of jactitation; the only difference is the proof being put upon the different party. Suppose a person means to dispute the validity of his marriage, he may, if he pleases, proceed in a cause of nullity of marriage, in which case he must state the circumstances of his marriage, and the prayer of his libel will be that under these circumstances his marriage may be pronounced void; the sentence then would be direct to that point. Suppose, on the other hand, he chooses to bring a suit of jactitation, and charges that the woman has claimed him to be her husband. If she justifies that jactitation by pleading her marriage, it is incumbent on her then to state the case and to go into the question whether it is a marriage or no; and if in that justificatory plea such circumstances be stated, as would

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have been the contents of the libel in a cause of nullity, the sentence, I contend, would have precisely the same effect.

I have known more instances than one to justify what I assert. The first suit that ever was brought upon the Marriage Act to avoid a marriage by reason of minority, where the party under age was married by licence without the consent of parents, was by a suit of jactitation. It was the case of *Frost v. Waldeck* in 1760. I looked into the sentence that was pronounced in that cause, and it was precisely in the same words as this now in question. Will anybody contend that it is not an effectual sentence declaring the marriage between these parties void? Your Lordships see it is a fallacy, therefore, to say that this method of proceeding in a cause of jactitation will not as effectually bring on the question of marriage as a cause of nullity of marriage. There were two other cases afterwards upon that Act that were brought in the same way; neither of them came to a decision, but the method of proceeding was the same. Afterwards there was a suit upon that Act of Parliament brought as a cause of nullity of marriage. I remember it being made a question whether even that was a proper way of proceeding; but the Judge was of opinion that the party might have proceeded in either way, conceiving, I presume, that the sentence in one way would be as effectual as in the other. With what propriety, then, can it be said, as it was on the other side, that all proceedings in causes for jactitation of marriage must be with an ill intent?

It does not apply at all to the manner of proceedings. Suppose it to be true what was asserted by the counsel, and I believe it is in a great measure so, that these suits were chiefly used for the purpose of inquiring into contracts of marriage; for before the Marriage Act put an end to such contracts it was difficult for parties to know whether they had entered into such contracts as would bind them or no. With what propriety can it be said that if a suit of jactitation be brought upon such contract it must be with an ill intent? I have mentioned that these suits have been brought under the Marriage Act, and therefore merely upon the question of marriage. In those cases the sentences are precisely conceived in the same words with the sentence in this cause. And if a man was to be married again after such a sentence pronounced, would it be argued one moment that he would be guilty of polygamy under this statute? If he would not, it must be, because such a sentence is on the same footing as if it had been given in a cause of nullity. For if a sentence given in a cause of nullity was to be offered as conclusive, and before you entered into evidence upon the fact, your Lordships would think it the proper time to offer it, there would be no occasion to go into the question; because, let the fact turn out what it might, that sentence would be satisfactory that the marriage was void, that

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is, that there was no marriage then subsisting between the parties. What is the assertion often, then, in a suit of jactitation, and what was the assertion in the cause now before your Lordships? The plaintiff to justify his claim upon the lady states that at a particular time he was married, states the circumstances, states the persons present; he attempts to prove this fact. The Judge, having considered the proofs and gone into the question, determined that there was no marriage, or, in other words, that the marriage is of none effect, that is, that the marriage that is pleaded there can have no effect; for he pronounces that, as far as to him appears, the party is a spinster, and free from all matrimonial contracts. If we are right, then, in bringing this cause within the exceptions of the Act, every objection I should conceive that can be stated is removed under the express regulation of the Act of Parliament, because the Legislature taking this matter into their consideration, well aware, as it must be supposed, of what inconveniencies might be argued to arise, have still enacted that, these sentences existing, the person marrying again shall not be within the Act of Parliament.

Under these considerations, the reply having been so fully and so ably gone into by the gentlemen who went before me, I shall take up your Lordships' time no longer than in hoping you will be of opinion that this sentence coming within the exceptions of the Act, it would be improper to go into any proof of the fact. And, therefore, I hope your Lordships will admit of this plea of the defendant.

The ATTORNEY-GENERAL—My Lords, it seems to be matter of just surprise that, before the commencement of the last century, no secular punishment had been provided for a crime of this malignant complexion and pernicious example. Perhaps the innocence of simpler ages, or the more prevailing influence of religion, or the severity of ecclesiastical censures, together with those calamities which naturally and necessarily follow the enormity, might formerly have been found sufficient to restrain it. From the moment these causes ceased to produce that effect imagination can scarcely state a crime which calls more loudly and in a greater variety of respects for the interposition of civil authority, which, besides the gross and open scandal given to religion, implies more cruel disappointment to the just and honourable expectations of the persons betrayed by it, which tends more to corrupt the purity of domestic life and to loosen those sacred connections and close relations designed by Providence to bind the moral world together, or which may create more civil disorder, especially in a country where the title to great honour and high office is hereditary.

[Here followed a great uproar behind the bar, and the Serjeant-at-Arms made the usual proclamation.]

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The misfortunes of individuals, the corruption of private life, the confusion of domestic relations, the disorder of civil succession, and the offence done to religion are suggested, not as ingredients in the particular offence now under trial, but as miseries likely to arise from the example of the crime in general, and are laid before your Lordships only to call your attention to the course and order of the trial, that nothing may fall out which may give countenance to such a crime and heighten such dangers to the public.

The present case, to state it justly and fairly, is stripped of much of this aggravation. The advanced age of the parties and their previous habits of life would reduce many of these general articles of mischief and criminality to idle topics of empty declamation. No part of the present complaint turns upon any ruin brought on the blameless character of injured innocence, or upon any disappointment incurred to just and honourable pretensions, or upon any corruption supposed to be introduced into domestic life. Nor should I expect much serious attention of your Lordships if I should urge the danger of entailing an uncertain condition upon a helpless offspring, or the apprehension of a disputed succession to the house of Pierrepont, as probable aggravations of this crime.

But your Lordships will be pleased withal to remember that every plea which, in a case differently circumstanced, might have laid claim to your pity for an unfortunate passion in younger minds is entirely cut off here. If it be true that the sacred rights of matrimony have been violated, I am afraid it must also appear that dry lucre was the whole inducement, cold fraud the only means to perpetrate that crime. In truth, the evidence, if it turns out correspondent to the expectations I have formed, will clearly and expressly represent it as a matter of perfect indifference to the prisoner, which husband she adhered to, so that the profit to be drawn from this marriage or from that was tolerably equal. The crime, stated under these circumstances, and carrying this impression, is an offence to the law, which, if it be less aggravated in some particulars, becomes only more odious in others.

But I decline making general observations upon the evidence. I will state it to your Lordships (for it lies in a very narrow compass) in the simplest and shortest manner I can invent. The facts (as the state of the evidence promises me they will be laid before your Lordships) form a case which it will be quite impossible to aggravate and extremely difficult to extenuate.

Considering the length of time which has intervened, a very few periods will comprise the facts which I am able to lay before your Lordships. First, the marriage of the prisoner with Mr. Hervey, her cohabitation with him at broken and distant intervals,

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the birth of a child in consequence of it, the rupture and separation which soon followed. Secondly, the attempt which the prisoner, in view to the late Lord Bristol's then state of health, made to establish the proofs of her marriage with the present Earl. Lastly, the plan which makes the immediate subject of the present indictment for bringing about the celebration of a second marriage with the late Duke of Kingston.

The prisoner came to London early in life, some time, as I take it, about the year 1740. About 1743 she was introduced into the family of the late Princess of Wales as her Maid of Honour. In the summer of 1744 she contracted an acquaintance with Mr. Hervey, which begins the matter of the present indictment. This acquaintance was contracted by the mere accident of an interview at Winchester Races. The familiarity immediately began, and very soon drew to its conclusion. Miss Chudleigh was about eighteen years of age, and resided at the house of a Mr. Merrill, her cousin, on a visit with a Mrs. Hanmer, her aunt, who was also the sister of Mr. Merrill's mother. One Mr. Mountenay, an intimate friend of Mr. Merrill's, was there at the same time. Mr. Hervey was a boy about seventeen years old, of small fortune, but the younger son of a noble family. He was Lieutenant of the "Cornwall," which made part of Sir John Daver's Squadron, then lying at Portsmouth, and destined for the West Indies. In short, he appeared to Mrs. Hanmer an advantageous match for her niece. From Winchester Races he was invited to Lainston, and carried the ladies to see his ship at Portsmouth. The August following he made a second visit to Lainston for two or three days, during which the marriage was contracted, celebrated, and consummated.

Some circumstances, which I have already alluded to, and others, which it is immaterial to state particularly, rendered it impossible, or improvident, in a degree next to impossible, that such a marriage should be celebrated solemnly, or publicly given out to the world. The fortune of both was insufficient to maintain them in that situation to which his birth and her ambition had pretensions. The income of her place would have failed. And the displeasure of the noble family to which he belonged rendered it impossible on his part to avow the connection. The consequence was that they agreed without hesitation to keep the marriage secret. It was necessary for that purpose to celebrate it with the utmost privacy, and, accordingly, no other witnesses were present but such as had been apprised of the connection and were thought necessary to establish the fact in case it should ever be disputed.

Lainston is a small parish, the value of the living being about £15 a year, Mr. Merrill's the only house in it, and the Parish Church at the end of his garden. On 4th August, 1744,

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Mr. Amis, the then rector, was appointed to be at the church, alone, late at night. At eleven o'clock Mr. Hervey and Miss Chudleigh went out, as if to walk in the garden, followed by Mrs. Hanmer, her servant (whose maiden name I forget; she is now called Ann Cradock, having married Mr. Hervey's servant of that name), Mr. Merrill, and Mr. Mountenay, which last carried a taper to read the service by. They found Mr. Amis in the church, according to his appointment, and there the service was celebrated, Mr. Mountenay holding the taper in his hat. The ceremony being performed, Mrs. Hanmer's maid was dispatched to see that the coast was clear, and they returned into the house without being observed by any of the servants. I mention these small circumstances because they happen to be recollected by the witness.

The marriage was consummated the same night, and he lay with her two or three nights following, after which he was obliged to return to his ship, which had received sailing orders.

Miss Chudleigh went back, as had been agreed, to her station of Maid of Honour in the family of the Princess Dowager. Mr. Hervey sailed in November following for the West Indies, and remained there till August, 1746, when he set sail for England. In the month of October following he landed at Dover, and resorted to his wife, who then lived by the name of Miss Chudleigh, in Conduit Street. She received him as her husband, and entertained him accordingly as far as consisted with their plan of keeping the marriage secret. In the latter end of November in the same year Mr. Hervey sailed for the Mediterranean, and returned in the month of January, 1747, and stayed here till May in the same year. Meanwhile she continued to reside in Conduit Street, and he to visit her as usual, till some differences arose between them, which terminated in a downright quarrel, after which they never saw each other more. He continued abroad till December, 1747, when he returned, but no intercourse, which can be traced, passed between them afterwards.

This general account is all I am able to give your Lordships of the intercourse between Mr. Hervey and his wife. The cause of the displeasure which separated them is immaterial to be enlarged upon. The fruit of their intercourse was a son, born at Chelsea, some time in the year 1747. The circumstances of that birth, the notice which people took of it, and the conversations which she held about that, and the death of the child, furnish part of the evidence that a matrimonial connection actually subsisted between them.

After having mentioned so often the secrecy with which the marriage and cohabitation were conducted, it seems needless to observe to your Lordships that the birth of a child was sup-

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pressed with equal care. That also made but an awkward part of the family and establishment of a Maid of Honour.

That which I call the second period was in the year 1759. She had then lived at a distance from her husband near twelve years. But the infirm state of the late Lord Bristol's health seemed to open the prospect of a rich succession and an earldom. It was thought worth while, as nothing better had then offered, to be Countess of Bristol, and for that purpose to adjust the proofs of her marriage. Mr. Amis, the minister who had married them, was at Winchester in a declining state of health. She appointed her cousin, Mr. Merrill, to meet her there on 12th February, 1759, and by six in the morning she arrived at the Blue Boar Inn, opposite Mr. Amis's house. She sent for his wife and communicated her business, which was to get a certificate from Mr. Amis of her marriage with Mr. Hervey. Mrs. Amis invited her to their house, and acquainted her husband with the occasion of her coming. He was ill a-bed, and desired her to come up. But nothing was done in the business of the certificate till the arrival of Mr. Merrill, who brought a sheet of stamped paper to write it upon. They were still at a loss about the form, and sent for one Spearing, an attorney. Spearing thought that the merely making a certificate, and delivering it out in the manner which had been proposed, was not the best way of establishing the evidence which might be wanted. He therefore proposed that a check-book (as he called it) should be bought, and the marriage be registered in the usual form, and in the presence of the prisoner. Somebody suggesting that it had been thought improper she should be present at the making of the register, he desired she might be called, the purpose being perfectly fair, merely to state that in the form of a register, which many people knew to be true, and which those persons of honour then present give no room to doubt. Accordingly his advice was taken, the book was bought, and the marriage was registered. The book was entitled "Marriages, Births, and Burials in the Parish of Lainston." The first entry ran, "The twenty-second of August, One thousand seven hundred and forty-two, buried, Mrs. Susannah Merrill, relict of John Merrill, Esq." The next was "The fourth of August, One thousand seven hundred and forty-four, married, the Honourable Augustus Hervey, Esq., to Miss Elizabeth Chudleigh, daughter of Colonel Thomas Chudleigh, late of Chelsea College, deceased, in the Parish Church of Lainston, by me, Thomas Amis." The prisoner was in great spirits. She thanked Mr. Amis, and told him it might be a hundred thousand pounds in her way. She told Mrs. Amis all her secrets, of the child she had by Mr. Hervey, a fine boy, but it was dead, and how she borrowed a hundred pounds of her Aunt Hanmer to make baby clothes. It served the purpose of the hour to disclose these things.

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She sealed up the register and left it with Mrs. Amis, in charge, upon her husband's death, to deliver it to Mr. Merrill. This happened in a few weeks after. Mr. Kinchin, the present rector, succeeded to the living of Lainston, but the book remained in the possession of Mr. Merrill.

In the year 1764 Mrs. Hanmer died, and was buried at Lainston. A few days after Mr. Merrill desired her burial might be registered. Mr. Kinchin did not know of any register which belonged to the parish, but Mr. Merrill produced the book which Mr. Amis had made, and, taking it out of the sealed cover in which it had remained till that time, showed Kinchin the entry of the marriage, and bade him not mention it. Kinchin subjoined the third entry, "Buried, December the tenth, One thousand seven hundred and sixty-four, Mrs. Ann Hanmer, relict of the late Colonel William Hanmer," and delivered the book again to Mr. Merrill.

In the year 1767 Mr. Merrill died; Mr. Bathurst, who married his daughter, found this book among his papers, and, taking it to be, what it purported, a parish register, delivered it to Mr. Kinchin accordingly. He has kept it as such ever since; and upon that occasion made the fourth entry, "Buried, the 7th of February, One thousand seven hundred and sixty-seven, John Merrill, Esq." The Earl of Bristol recovered his health, and this register was forgotten till a very different occasion arose for inquiry after it.

The third period, to which I begged the attention of your Lordships in the outset, was in the year 1768. Nine years had passed since her former hopes of a great title and fortune had fallen to the ground. She had at length formed a plan to attain the same object another way. Mr. Hervey also had turned his thoughts to a more agreeable connection, and actually entered into a correspondence with the prisoner for the purpose of setting aside a marriage so burdensome and hateful to both. The scheme he proposed was rather indelicate; not that afterwards executed, which could not sustain the eye of justice a moment, but a simpler method, founded in the truth of the case, that of obtaining a separation by sentence *a mensâ et thoro propter adulterium*, which might serve as the foundation of an Act of Parliament for an absolute divorce. He sent her a message to this effect, in terms sufficiently peremptory and rough, as your Lordships will hear from the witness. Mrs. Cradock, the woman I have mentioned before as being Mrs. Hanmer's servant and present at the marriage, was then married to a servant of Mr. Hervey, and lived in the prisoner's family with her husband. He bade her tell her mistress that he wanted a divorce, that he should call upon her (Cradock) to prove the marriage, and that the prisoner must supply such other evidence as might be necessary.

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This might have answered his purpose well enough, but her's required more reserve and management, and such a proceeding might have disappointed it. She therefore spurned at that part of the proposal, and refused, in terms of high resentment, to prove herself a whore. On 18th August following she entered a caveat at Doctors' Commons to hinder any process passing under seal of the Court at the suit of Mr. Hervey against her in any matrimonial cause without notice to her proctor.

What difficulties impeded the direct and obvious plan, or what inducements prevailed in favour of so different a measure, I cannot state to your Lordships. But it has been already seen in a debate of many days what kind of plan they substituted in place of the former.

In the Michaelmas session of the year 1768 she instituted a suit of jactitation of marriage in the common form. The answer was a cross-libel, claiming the rights of marriage. But the claim was so shaped and the evidence so applied that success became utterly impracticable.

A grosser artifice, I believe, was never fabricated. His libel stated the marriage, with many of its particulars, but not too many. It was large in alleging all the indifferent circumstances which attended the courtship, contract, marriage ceremony, consummation, and cohabitation, but when it came to the facts themselves it stated a secret courtship and a contract with the privity of Mrs. Hanmer alone, who was then dead. The marriage ceremony, which, in truth, was celebrated in the church at Lainston, was said to have been performed at Mr. Merrill's house, in the parish of Sparshot, by Mr. Amis, in the presence of Mrs. Hanmer and Mr. Mountenay, who were all three dead. Mrs. Cradock, whom but three months before he held out as a witness of the marriage, was dropped, and, to shut her out more perfectly, the consummation is said to have passed without the privity or knowledge of any part of the family and servants of Mr. Merrill, meaning perhaps that Cradock was servant to Mrs. Hanmer. It was further insinuated that the marriage was kept a secret, except from the persons before-mentioned.

To these articles the form of proceeding obliged her to put in a personal answer upon oath. She denies the previous contract; she evades the proposal of marriage by stating that it was made to Mrs. Hanmer without *per* privity, not denying that it was afterwards communicated to her. The rest of the article, which contains a circumstantial allegation of the marriage, together with the time, place, witnesses, and so forth, she buries in the formulary conclusion of every answer by denying the rest of the said pretended position or article to be true in any part thereof. Finally, she demurs to the article which alleges consummation.

Denying the rest of the article to be true in any part of it

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reserves this salvo. The whole averment of marriage was but one part of the article; that averment (the language is so constructed) makes but one member of a sentence, and yet it combines false circumstances with true. They were, in Mr. Merrill's house at Sparshot, joined together in holy matrimony. This part of the article, as her answer calls it, is not true. It is true they were married, but not true that they were married at Sparshot or at Mr. Merrill's house.

How was this gross and palpable evasion treated? It is the course of the Ecclesiastical Court to file exceptions to indistinct or insufficient answers. Otherwise, to be sure, they could not compel a defendant to put in any material answer. But it was not the purpose of this suit to exact a sufficient answer; consequently, no exceptions were filed, but the parties went to issue.

The plan of the evidence also was framed upon the same measured line. The articles had excluded every part of the family. Even the woman whom Mr. Hervey had sent to demand the divorce was omitted. But her husband is produced to swear that in the year 1744 Mr. Hervey danced with Miss Chudleigh at Winchester Races and visited her at Lainston, and in 1746 he heard a rumour of their marriage. Mary Edwards and Ann Hilliam, servants in Mr. Merrill's family, did not contradict the article they were examined to, which alleges that none of his servants knew anything of the matter. But they had heard the report. So had Messrs. Robinson, Hossach, and Edwards. Such was the amount of Mr. Hervey's evidence, in which the witnesses make a great show of zeal to disclose all they know, with a proper degree of caution to explain that they knew nothing.

The form of examining witnesses was also observed on her part, and she proved most irrefragably that she passed as a single woman, went by her maiden name, was Maid of Honour to the Princess Dowager, bought and sold, borrowed money of Mr. Drummond, and kept cash with him and other bankers by the name of Elizabeth Chudleigh; nay, that Mr. Merrill and Mrs. Hanmer, who had agreed to keep the marriage secret, conversed and corresponded with her by that name.

For this purpose a great variety of witnesses was called, whom it would have been very rash to produce without some foregone agreement or perfect understanding that they should not be cross-examined. Many of them could not have kept their secret under that discussion, even in the imperfect and wretched manner in which cross-examination is managed upon paper and in those Courts. Therefore not a single interrogatory was filed, nor a single witness cross-examined, though produced to articles exceedingly confidential, such as might naturally have excited the curiosity of an adverse party to have made further inquiries.

In the event of this cause, thus treated, thus pleaded, and thus proved, the parties had the singular fortune to catch a

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judgment against the marriage by mere surprise upon the justice of the Court.

While I am obliged to complain of this gross surprise, and to state the very proceedings in the cause as pregnant evidence of their own collusion, I would not be understood to intend any reflection on the integrity or ability of the learned and respectable Judge.

For oft, though wisdom wake, suspicion sleeps
At wisdom gate, and to simplicity
Resigns her charge ; while goodness thinks no ill,
Where no ill seems.

Nor should any imputation of blame be extended to those names which your Lordships find subscribed to the pleadings. The forms of pleading are matters of course. And if they were laid before counsel only to be signed, without calling their attention to the matter of them, the collusion would not appear. A counsel may easily be led to overlook what nobody has any interest or wish that he should consider.

Thus was the way paved to an adulterous marriage, thus was the Duke of Kingston drawn in to believe that Mr. Hervey's claim to the prisoner was a false and injurious pretention, and he gave his unsuspecting hand to a woman who was then, and had for twenty-five years, been the wife of another.

In the vain and idle conversations which she held, at least with those who knew her situation, she could not refrain from boasting how she had surprised the Duke into that marriage. "Do not you think" (says she with a smile to Mrs. Amis) "do not you think that it was very kind of His Grace to marry an old maid?" Mrs. Amis was widow of the clergyman who had married her to Mr. Hervey, who had assisted her in procuring a register of that marriage, and to whom she had told of the birth of the child. The Duke's kindness, as she insultingly called it, was scarcely more strange than her manner of representing it to one who knew her real situation so well.

This is the state of the evidence, which must be given were it only to satisfy the form of the trial, but is in fact produced, to prove that which all the world knows perfectly well as a matter of public notoriety. The subject has been much talked of, but never, I believe, with any manner of doubt, in any company at all conversant with the passages of that time in this town. The witnesses, however, will lay their facts before your Lordships, after which, I suppose, there can be no question what judgment must be pronounced upon them. For your Lordships will hardly view this Act of Parliament just in the light in which the prisoner's counsel have thought fit to represent it, as a law made for beggars, not for people of fashion. To be sure, the preamble does not expressly prove the Legislature to have foreseen or expected that

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these would be the crimes of higher life or nobler condition. But the Act is framed to punish the crime, wherever it might occur, and the impartial temper of your justice, my Lords, will not turn aside its course in respect to a noble criminal.

Nor does the guilt of so heinous a fraud seem to be extenuated by referring to the advice of those by whose aid it was conducted, or to the confident opinion they entertained of the success of their project. I know this project was not (nor did I even mean to contend it was) all her own. Particularly, in that fraudulent attempt upon public justice, it could not be so. But, my Lords, that imparting a criminal purpose, to the necessary instruments for carrying it into execution, extenuates the guilt of the author is a conceit perfectly new in morality, and more than I can yield to. It rather implies aggravation, and the additional offence of corrupting these instruments. Not that I mean by this observation to palliate the guilt of such corrupt instruments. I think it may be fit, and exceedingly wholesome, to convey to Doctors' Commons that those among them—if any such there are—who, being acquainted with the whole extent of the prisoner's purpose, to furnish herself with the false appearance of a single woman in order to draw the Duke into such a marriage, assisted her in executing any part of it, are far enough from being clear of the charge contained in this indictment. They are accessories to her felony, and ought to answer for it accordingly. This is stating her case fairly. The crime was committed by her and her accomplices. All had their share in the perpetration of the crime. Each is stained with the whole of the guilt.

My Lords, I proceed to examine the witnesses. The nature of the case shuts out all contradiction or impeachment of testimony. It will be necessary for your Lordships to pronounce that opinion and judgment which so plain a case will demand.

The SOLICITOR-GENERAL—My Lords, we will now proceed to call our witnesses.

ANN CRADOCK called.

CLERK OF THE CROWN—Hearken to your oath. The evidence that you shall give on behalf of our Sovereign Lord the King's Majesty against Elizabeth Duchess Dowager of Kingston, the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God. (Then she kissed the Book.)

Mr. WALLACE—My Lords, I am desired by the noble lady at the bar to apply to your Lordships for an indulgence that a question may be put to the witness by her counsel.

LORDS—Aye, aye.

Mr. WALLACE—I shall beg the witness may inform your Lordships whether she has not had a security for some provision or benefit, or a promise, in consequence of the evidence she is to give on this indictment?

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The WITNESS—No.

Examined by the SOLICITOR-GENERAL—How long have you been acquainted with the lady at the bar?—Above thirty-two years.

Where did you first become acquainted with her?—I saw the lady first in London, afterwards at Lainston.

What occasion carried you to the lady at Lainston?—Along with a lady that I served.

Name the lady?—Mrs. Hanmer.

Was Mrs. Hanmer any relation to the lady at the bar?—Her own aunt.

Was the lady at the bar at Lainston along with Mrs. Hanmer?—Not when I first went down to Lainston.

Did she come down there afterwards?—Yes.

Do you remember seeing Mr. Augustus Hervey there at that time?—I remember seeing Mr. Augustus Hervey there, but not at the time I first saw the lady there.

When did Mr. Hervey come there?—It was in June, at the Winchester Races.

How long did he stay there at that time?—I cannot particularly say how long he might stay; he was coming and going.

Were you in Lainston Church with Mr. Hervey and that lady at any time in that summer?—I was.

At what time of the day?—It was towards night: it was at night, not in the day.

Upon what occasion?—To see the marriage.

Name the persons who were present?—Mr. Merrill, Mrs. Hanmer, Mr. Mountenay, Mr. Hervey, Miss Chudleigh, and myself.

Who was the clergyman?—Mr. Amis, who belonged to the church.

Were they married there?—Yes; I saw them married.

Was the marriage kept secret?—Yes.

By what ceremony was the marriage?—By the matrimonial ceremony; by the Common Prayer Book.

Were you employed to take care that the other servants should be out of the way?—Yes.

Did they return to Mr. Merrill's house after the marriage?—Yes, they did.

How far is the church from the house?—Not a great distance, but I cannot say how far; it is in the garden.

Did Mr. Amis return with the party into the house?—Not that I saw.

Did you attend on the lady as her maid?—I did at that time, her own not being able.

After the ceremony did you see the parties in bed together?—I did.

By a LORD—Repeat what you said?—I saw them put to bed; I also saw Mrs. Hanmer insist upon their getting up again.

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Examination continued—Did you see them the next morning?—I saw them that night afterwards in bed, the same night after Mrs. Hanmer went to bed.

Did you see them afterwards in bed for some nights after that?—I saw them particularly in bed the last night Mr. Hervey was there, for he was to set out in the morning at five o'clock. I was to call him at that hour, which I did, and, entering the chamber, I found them both fast asleep. They were very sorry to take leave.

Can you fix what year this was?—I believe it to be the year 1744, but I am certain it was the same year in which the "Victory" was at Portsmouth.

Do you recollect what time of the year it was?—In the month of August, I think.

What is your reason for thinking it was in the month of August?—My reason is that it was in the time of Maunbill Fair, and also that there were greengages ripe, which the lady and gentleman were both very fond of.

Do you recollect how long it was after the death of Mr. Merrill's mother?—No, I cannot justly say.

Where did Mr. Hervey go, as you understood, the morning he went away?—To Portsmouth.

Did you understand that he was then in the sea service?—I did, and that he was going with Admiral Davers.

Have you any particular reason for knowing that he did go with Admiral Davers?—The reason I have to believe he did go with him is, the person whom I married afterwards was Mr. Hervey's servant.

Was he servant to him at that time?—He was.

Did you receive any letter from the person you afterwards married, who was Mr. Hervey's servant, and attended him?—I did, from Port Mabon.

Do you know what relation Mr. Merrill was to the lady at the bar?—First cousin.

Who was Mr. Mountenay, whom you mentioned as present at the marriage?—A friend of Mr. Merrill as he pretended.

Did he live in the family at that time?—He was in the family at that time, and had been from the time of the death of his mother.

Do you know whether any other part of the family, of both parties, were acquainted with the marriage, except those persons whom you have mentioned?—No, I did not at that time.

Did the lady change her name on the marriage?—Never in public, to my knowledge.

Had you occasion after this to see the lady in London?—I saw the lady in London many times.

Do you know whether there were any children of the marriage?—I believe one.

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What reason have you for believing so?—The lady herself told me so, and her aunt also, whom I ought to have mentioned first. The lady told me that she would take me to see the child.

Did she offer to carry her aunt as well as you to see the child?—I do not know that.

How long after the marriage was it that she told you she would take you to see the child?—That I cannot say, but it was after Mr. Hervey returned a second time.

Returned from whence?—I heard he had been at Port Mabon.

Do you recollect how long Mr. Hervey had been absent the first time?—No, I do not.

How long had he been absent the second time?—After his return the second time I believe the child to have been begotten.

How long after Mr. Hervey's second return was it that she told you she would carry you to see the child?—It was after his first return.

A LORD—I believe there is some mistake. Let the witness explain that.

Examination continued—Was it after Mr. Hervey's first or second return that the lady told you she would carry you to see the child?—I believe the first time.

Do you recollect how long that was after the marriage?—I do not recollect.

When did you marry Mr. Hervey's servant?—The 11th of February, 1752.

Did the prisoner at the bar say anything particular to you about the child?—She told me the child was a boy, and like Mr. Hervey.

How long did you continue in the service of Mrs. Hanmer?—Till she died.

When did Mrs. Hanmer die?—She has been dead eleven years the second of last December.

Had you any occasion to know what became of the child, whether it lived or died?—I know nothing further than what the lady said. When I expected to go to see it the lady came in great grief and told me it was dead.

Have you any reason to know at what place the child was born?—At Chelsea, by reason her mother could not go there.

Who informed you that the child was born at Chelsea?—Mrs. Hanmer told me this.

Have you ever heard it from the prisoner?—Yes, I certainly have.

She said her mother could not go there. What do you understand to be the reason why Mrs. Chudleigh could not go to Chelsea?—By reason her husband and son were buried there, as I have been told.

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Had you any conversation with the prisoner, about the year 1768, about any message to be delivered to the prisoner that Mr. Hervey had given to you?—I had a message from Mr. Hervey signifying to the lady he was determined to be parted from her.

Did you deliver that message?—Not for some time after I received it, not being able.

When did you deliver it?—On Saturday morning, when the lady came up to me and told me that she knew what had been the matter with me; I told her Mr. Hervey desired me to let her know that he was determined to be, I should have said divorced, but I said parted; and also that he desired me to tell the lady she had it in her own power to assist him. I delivered the message, and the lady replied, “ Was she to make herself a whore to oblige him?”

Did she appear to be with child before this conversation with you?—She did appear so to be.

What parish is Mr. Merrill’s house in?—I believe in St. George’s; his house at Lainston is a parish of itself.

Are there any other houses in the parish besides Mr. Merrill’s?—Not at Lainston, there is not.

Was there service regularly in Lainston Church, or did the family go to any other church?—They went to service at Sparshot Church.

Cross-examined by Mr. WALLACE—Have you not declared to some persons that you had an expectation of some provision or benefit on the event of this prosecution?—I never could declare I had anything promised me by anybody.

Expectation of provision from the persons that prosecute?—I never had; I know none of the family.

Where have you lived for this month, or two, or three?—I have lived at Mr. Beauwater’s.

What is the reason of your having your residence there?—In regard to his lady being a relation to Mr. and Mrs. Bathurst.

Had your residence there any relation to this prosecution?—It is unknown to me if it has.

What have you to do with Mr. Bathurst?—Mrs. Bathurst is so kind as to have me there, as being a servant to her aunt from my childhood.

How long have you been at Mr. Beauwater’s?—I am sure I cannot justly say the day when I came there.

How long before this prosecution was commenced?—I can’t tell when I came there; I can’t tell how long I have been there.

I do not mean that you should answer to a day, but according to the best of your memory?—About four months, I fancy.

Was it before or since you appeared before the Grand Jury?—Since I appeared before the Grand Jury.

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Do you know who is the prosecutor of this indictment?—Mr. Medows, I imagine.

Do you know Mr. Medows?—I have seen him twice or three times in my life, and that is all.

Where?—The first time I ever saw him was at Mr. Beauwater's house, since I came to town.

Are you to stay at Mr. Beauwater's, or return, when this prosecution is over?—The last home I had is at Lainston, where I hope I may return again. I went down there in August—a twelvemonth.

Have you never declared to anybody that you had an expectation of some provision from the cause now in hand?—I could not declare it, as I had no offers made me from the prosecutor.

Have you declared it?—I have just now said I could not.

Would you be understood that you have not?—What was I to declare?

Whether you have not declared, whether true or false I do not care, that you had an expectation of some provision from this prosecution?—I could not declare it before it was made to me.

You must say whether you did say so or not?—I never had any offer from the prosecution.

Had you not an expectation from the prosecution?—No, I could not say that, when they never offered it to me.

Do you understand the question generally, or confined to the prosecutor?—I think it can be confined to none but himself.

Have you any expectation from anybody else?—No, none.

Nor ever declared so?—No, I never declared that I had any such expectation.

At what time of the night was this marriage?—I cannot possibly tell the hour; it was at night.

Have not you mentioned to anybody some hour of the night?—I do not know that I have mentioned it any further than that it was at night.

You have said that you were employed to keep the servants out of the way at the time; how came you then to go to the church?—I was employed to come out of the church after the marriage, and see that the house was clear; after the marriage and not before.

Was there any care taken before they went to church?—No, I do not know that there was. Mr. and Mrs. Merrill dined out that day, and I do not know that any of the house knew that there was to be a marriage.

Are you sure that Mr. and Mrs. Merrill dined out that day?—Yes.

When did Mrs. Merrill die?—I do not know. Mrs. Hanmer it was; there was no Mrs. Merrill at that time.

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Then by Mrs. Merrill you meant Mrs. Hanmer, did you?—Certainly I did mean Mrs. Hanmer, for there was no Mrs. Merrill.

Were you desired to go to the church?—I don't know whether I was desired to go, but there I was—that I recollect.

Did you go as a witness, or out of curiosity?—I was there to see the marriage. As to witness, I was not called to be a witness.

Did any of the parties know you were in the church?—Those that were in the church knew it.

Did you hear the ceremony performed?—I did.

Did you hear the whole ceremony?—I believe so, certainly.

Have not you said you did not hear the ceremony?—Not that I know of, and I never was asked, to my knowledge.

Do you speak positively that you have not so declared?—Certainly I do, for I know whether I was asked or not.

How long did Mr. Hervey stay there after this marriage?—I really cannot say how many days; he was not long there.

You said that Mrs. Hanmer made them get up soon after they went to bed. How long did Mrs. Hanmer sit up after that?—I cannot justly say how many hours; I can't say whether it might have been one, or two, or three hours.

Was it Mrs. Hanmer's custom to lock the door where Mrs. Chudleigh lay?—I never knew that she did lock the door at all.

Nor anybody by her order?—Not to my knowledge; I never knew the door ordered to be locked by anybody, nor by myself neither. I am sure I never locked it.

You are sure the door was never locked then, when Mr. Hervey went out, when he was made to get up and leave the room as you have said?—Went out where? I don't understand.

You have said he was made to get up again?—To the best of my knowledge the lady got up too, as well as Mr. Hervey.

And both left the room?—I believe they both left the room, I know nothing to the contrary; but I know they afterwards went to bed together.

Have you not declared you knew nothing of this marriage?—No, never in my life, to my knowledge.

That you did not remember anything about it?—It is very odd that I can remember it now, and should not have remembered it before: I ever had it in my memory.

Have not you declared that you did not remember it?—No, not that I know of.

I desire you will give a positive answer, yes or no, whether you have or have not declared it?—I never could have declared that which I did not know.

That you did not remember anything about it?—No, I never could say that.

Did you or did you not say so?—No, I did not say so.

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By LORD BUCKINGHAM—I beg to put one question to the witness. You know that you speak not only in the presence of this respectable Court, but in the presence of Almighty God?—Yes.

Have you, or have you not, ever declared that you did expect an advantage from the prosecution? Say aye or no?—I must say no; I could not say aye.

You have told us that Mr. Merrill and Mrs. Hanmer went out to dinner the day on which the marriage was performed. I should be glad to know at what time Mr. Merrill and Mrs. Hanmer returned home?—I believe it might be between seven and eight o'clock, as I had given tea out of the housekeeper's room to the gentleman and lady by candle-light.

What day of the month was it?—That I cannot tell.

By the DUKE OF GRAFTON—Did you ever see the child that the lady at the bar offered to carry you to see?—No, I never did.

What was the interval of time between the offer to carry you to see the child and the death of that child?—That I cannot justly say neither, but, as far as I can remember, the day that I was to go to see the child the lady came and said it was dead.

Though you cannot exactly recollect the interval between the one transaction and the other, yet still you may speak at large. Was it a week? Was it a month? Was it half a year?—It was not a month, nor yet half a year.

Were there a few days' interval between the one and the other?—There was, but I cannot say how many days.

Did you, in the space of these few days, ever express to the lady at the bar your earnestness and desire to see the child, which you say the lady at the bar told was so like Mr. Hervey?—I expressed my desire at the time when the lady spoke of the child to her aunt.

What was the answer that you had for not carrying you immediately to the child?—The lady told me she could not come on such a day with the Princess's coach, and that I should go and see the child.

Were you examined by the Ecclesiastical Court?—I was not.

Did you know at the time that there was such a process going on here?—I was told by Mr. Hervey there was.

Did you offer to Mr. Hervey, or to any other of the parties, to give the evidence which you now have proved it was material to give?—He told me he must call upon me to assist him in his marriage.

Did anything else pass relative to the process in Doctors' Commons after Mr. Hervey's conversation with you?—Yes, there certainly was, though I never was called.

Did anything pass between Mr. Hervey and you, or between any of the parties and you, after that declaration of Mr. Hervey's to you?—I was to acquaint the lady with his intentions.

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You said you were to remove the servants out of the way at Mr. Merrill's house at the time of the marriage; how many servants might there be about Mr. Merrill's house at the time of the marriage?—The butler, a maid who waited on Miss Merrill, two housemaids, a laundrymaid. One of the housemaids belonged to Mrs. Hanmer, who always went down along with her, and there was a kitchenmaid.

Were there any lights in the church at the time of the ceremony being performed?—There was a wax light in the crown of Mr. Mountenay's hat.

By LORD TOWNSHEND—Whether she has ever received or been offered anything to withhold her evidence relative to the supposed marriage?—I never have.

By LORD HILLSBOROUGH—Did you ever receive any letter offering you an advantage in case you would appear against the prisoner, before you were subpoenaed at Hick's Hall?—I received a letter from a friend wherein I was told that a gentleman of their acquaintance would get me a sinecure, but on what account I know not.

A gentleman of whose acquaintance?—I do not know who the gentleman was; it never was explained to me who the gentleman was, nor I never asked.

Who was the friend who wrote that letter to you?—Mr. Fozard, of Piccadilly.

What answer did you make to that letter?—I made no answer any further, but that it was very kind in anybody that would assist me in getting me anything.

Who is Mr. Fozard?—A person that lives near Hyde Park Corner, and keeps livery stables.

You say he wrote you word that some of their friends would get you a sinecure?—I said a gentleman of their acquaintance.

Of whose acquaintance?—Mr. Fozard's.

Upon what account did you conceive or understand that he was to get you a sinecure?—That I cannot tell you.

What have you done with the letter?—I do not know where the letter is; I know I have it not.

Will you take upon you to say that there was not in that letter an expression intimating that if you would appear against the prisoner at the bar a sinecure would be gotten for you?—I certainly do say there was no such expression in the letter; only a friend of theirs, or a gentleman of their acquaintance, I do not know which, would get me a sinecure.

Did you, or did you not, by virtue of your oath, understand that that was to be the consequence of your appearing against the prisoner at the bar?—I did not know that that was to be the consequence of my appearing. I had no room to imagine so,

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because I know not the person of the prosecutor, nor none of his family.

Did you advise with anybody concerning what you should do with regard to that letter?—I certainly did apply to a friend, and acquainted him I had received such a letter.

What did you write to your friend?—I never wrote to any friend; I applied to a friend, and showed the letter.

Whether you did not ask advice from somebody, what you should do with regard to that letter?—I did not ask anybody what I was to do with it; I received it.

What did you consult that friend about?—To let him know I had received such a letter, but I did not know what it might be upon, or what it might not.

Did he read the letter?—Yes.

What conversation passed between you and him on the subject of the letter?—I told him I did not know what it might be from, but that I apprehended it might be something concerning my being called upon in point of the lady; I think I told him that I had once been told that I might have the same settled upon me as the lady promised me when I went into the country.

What reason had you for thinking so?—The reason I had for thinking so was because I had been told once that I might have the same given me that the lady at the bar offered me when I was to go into the country if I would speak the truth, but by whom I know not; I never asked the question.

I desire to know what you did with that letter, whether you put it into the hands of the person whom you consulted?—I put in into no one's hands; the person had the letter I consulted.

You put it into that person's hand to read it?—I gave the letter into that person's hands to read it, and told him he might show it to Mr. Hervey if he would.

For what purpose did you desire it might be shown to Mr. Hervey?—For this purpose, believing it might be against him and the lady; but by whom I knew not, for I never asked the question who it was that was to give it.

Did you desire your friend to show it to the prisoner at the bar?—That was impossible, for the lady was not in England.

Did you then desire him to show it to anybody on her part?—I never look upon it, if it was shown to Mr. Hervey, it would be on her part, as being man and wife.

Whether you desired it to be shown to anybody else?—No, not besides Mr. Hervey.

Adjourned.

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Fourth Day—Saturday, 20th April, 1776.

ANN CRADOCK, *recalled.*

Examination by Lord Hillsborough continued—I was exceedingly glad the House was adjourned, but I would much rather it had been adjourned sooner, because I now lie under a good deal of difficulty to resume the thread of these questions that for my own information, and for that of the House, I thought highly proper and necessary to be explicitly and exactly answered. My Lords, I think the last question that I put to the witness at the bar was, whether she had put that letter, which she said was signed by Fozard, into the hand of any other person? If I do not mistake, my Lords, she said she had put it into the hand of a friend of hers to read. Upon asking her whether she had any other intention than that of putting the letter into his hand, I think she said she told the person he might show the letter to Mr. Hervey, as she apprehended it related to him. Now I desire to ask the evidence at the bar whether she knows that her friend did show that letter to Mr Hervey or not?—My friend did show it to Mr. Hervey.

Did your friend tell you what Mr. Hervey said concerning the letter?—My friend told me that he desired I should keep the letter.

Do you mean Mr. Hervey or the friend desired you to keep the letter?—I mean the answer that was given upon the letter being shown was brought by my friend, and Mr. Hervey desired me to keep the letter.

Did your friend, who carried the letter from you to Mr. Hervey, say anything more to you than that Mr. Hervey desired you should keep the letter?—He told me that I should acquaint the lady that was abroad with it.

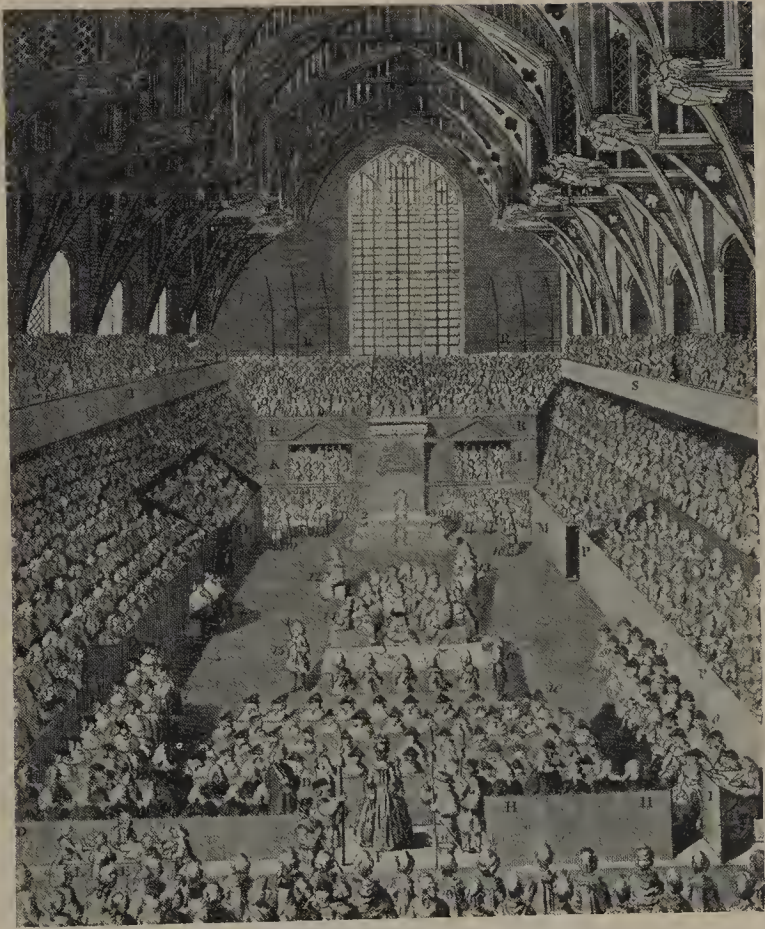
Did you acquaint the lady that was abroad with it?—I had it not in my power to do so.

Did you acquaint anybody else with it?—I did several of my acquaintance.

In particular, did you acquaint anybody that was concerned in business for the lady?—No.

I desire to know whether you did by yourself, or by anybody else for you, make any answer whatever to the letter to Mr. Fozard?—I went to Mr. Fozard when I received the letter, as in the letter it was required to know my age, and where I was born.

I desire you will inform their Lordships of the whole of what passed between Mr. Fozard and you at that interview?—Nothing in particular further than relating to where I was born, and



Representation of the Trial in the Westminister Hall.

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my age; my age I did not know. I did not ask who was to give me the sinecure.

Did not you think it extraordinary that Mr. Fozard should inquire of you your age, and where you were born?—I certainly did think it extraordinary.

Whether you did not ask the meaning of it?—I did not ask any meaning for it.

By LORD DERBY—You said yesterday that you did not expect to receive something adequate to what you had received from the prisoner at the bar. What did you formerly receive from the prisoner at the bar?—Many favours in friendship, but not anything in particular.

What were you offered by the lady?—Twenty guineas a year to go and settle in the country, and the choice of three different counties.

At what time was that offer made to you?—The time I cannot justly remember.

Recollect; how many years was it ago?—I believe it may be three years ago, or four, I am not certain.

What was your answer to that proposal?—It made me very unhappy to think that I was to be banished, but I consented to go into Yorkshire.

What were the counties that were proposed to you?—Yorkshire, Derbyshire, I think, and Northumberland.

In consequence of that consent to go into Yorkshire, did you go into Yorkshire?—No, I did not; I went into Thoresby; I tried, but I could go no farther.

What was the reason that you could go no farther?—From being unhappy, and going from all my friends.

Did you receive any sum of money in consequence of going as far as Thoresby?—None, no further than was to carry me to the place where I said I was to go.

You mentioned an annuity of twenty guineas a year; has that annuity been paid, or have you received any part of it since that agreement?—No.

By LORD COVENTRY—You said you were present at the marriage in 1744; I desire to know whether you have ever communicated that information to any person till this year, and to whom?—I have several times to many, but to particular persons I cannot speak.

By LORD DERBY—I should be glad to know whether you do understand, or do not understand, that any sum or sums were ever paid to any person for your subsistence and board on the part of the prisoner at the bar?—No, I do not know that ever any sum was paid upon my account.

By LORD BUCKINGHAM—I desire to ask the witness whether

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she at any time did receive any present whatever from the prisoner at the bar?—Several, in point of friendship.

By LORD TOWNSHEND—Were you ever offered any sum of money at any time to conceal any evidence?—No.

By either side?—No.

By LORD CAMDEN—I desire to know whether you saw the lady at Thoresby on the way to Yorkshire?—I was in the lady's house and saw her several times.

In any of those interviews did anything pass respecting the annuity of twenty guineas a year and the journey you were then making to Yorkshire?—No, not anything in particular as to that.

What was the reason of your return from Thoresby and not going to your journey's end?—My reason was from my ill state of health and unhappiness of mind.

By LORD LITTLETON—Did the lady explain to you what were her motives for sending you, or, as you called it, banishing you, into those distant counties?—No, my Lords.

By LORD DERBY—What did you apprehend to be the lady's motives for such a proposal?—That I was ever at a loss to know, because I never asked.

By the DUKE OF ANCASTER—Did you consult a friend on account of the substance of Mr. Fozard's letter?—I did.

I desire you to tell the house who that friend was?—My friend was Dr. Hossack, who is physician of Greenwich Hospital.

What is become of that letter, or have you it?—I have it not, but it is in my box, I believe, at Lainston, as I carried it with me when I went there with my other things.

By the DUKE OF RICHMOND—Was not the marriage to be kept a secret?—Yes.

If during the time the marriage was to be kept a secret any person had asked you about the marriage, would you have owned it, or denied it?—I never from the time divulged the secret, until it had been told before.

Did no person, during the time it was a secret, ever ask you if you knew it?—Several have asked me, but I have always replied no.

By the LORD PRESIDENT—Do you not know that your husband was examined in the spiritual Court, in the cause of jactitation?—I know he was called upon in the Court, but what passed I am an utter stranger to, as I never asked.

Had not Mr. Hervey intimated to you that you were to be called upon on that occasion?—He did.

After that did you hear anything from Mr. Hervey respecting your attendance in that cause?—Mr. Hervey told me he must call upon me to assist him in the marriage and to swear to Mrs. Hanmer's handwriting.

Were you ever called upon that occasion?—I was not.

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By LORD DERBY—Did you live with Mrs. Hanmer until the time of her death?—I did.

Which happened eleven years ago the 2nd of last December?—Yes.

Upon what have you subsisted since that time?—Mrs. Hanmer left me two hundred pounds; one was taken up, the other was left. I quitted the lady's house and went to Newington. I should have told you the two hundred pounds was in the lady's hands (pointing to the Duchess); one was taken up, and the other, with my husband's income, supported me whilst he lived.

How do you know that that two hundred pounds was left you by Mrs. Hanmer?—It was left me in her will.

By the DUKE OF ANCASTER—Do you, of your own knowledge, assert that there was a child?—I do assert I was told so. I never saw the child.

Who told you so?—Mrs. Hanmer told me so, and the lady told me at our return out of the country.

Who told you there was a child?—This lady at the bar told me so herself. Both told me so.

Do you, from your own knowledge, affirm that that child is dead?—The lady at the bar told me it was dead, as she told me before she would take me to see it.

Did the lady at the bar bring the Princess of Wales' coach and carry you to see the child at Chelsea?—The lady told me she would come in the Princess' coach and carry me to see the child.

By LORD RADNOR—How old do you apprehend the child was at the time of its death?—That I can give no account of. It was very young, but the age I know not.

Weeks, months, or years?—Months, but not years.

Did you ever hear that the child was baptised?—I did hear that the child was baptised, but Mrs. Hanmer and I were in the country at that time.

Did you ever hear what the child's name was?—No, I cannot recollect that I did.

Did you ever hear where the child was buried?—I did hear that it was buried at Chelsea.

Who told you so?—The lady at the bar told me so herself one day when I was airing in the coach with her that way.

By LORD FORTESCUE—How have you subsisted since your husband's death?—With what I made off my furniture which was in my house, which was all new.

How long is it since your husband died?—Five years last March.

CÆSAR HAWKINS, examined by Mr. DUNNING—Are you acquainted with the lady at the bar, and how long have you been so?—A great many years; I believe about thirty.

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Are you acquainted with the present Lord Bristol? and how long have you been so?—I have had the honour of knowing the Earl of Bristol nearly as many years.

Do you know of any intercourse between my Earl of Bristol and the lady at the bar?—Of an intercourse certainly; of acquaintance undoubtedly.

Do you know from the parties of any marriage between them?—I do not know how far anything that has come before me in a confidential trust in my possession should be disclosed, consistent with my professional honour. (Question and answer repeated.)

MR. DUNNING—I trust your Lordships will see nothing in my question that can betray confidential trust, or dishonour Mr. Hawkins in giving it. My question is simply whether Mr. Hawkins knows, from the parties, of any marriage between them.

LORD HIGH STEWARD—The question that was asked by the counsel at the bar is, “Whether the witness knew, from any information of either of the two parties, that they were married?” The witness objects to it, whether he is to answer any questions that are inconsistent with his professional honour. Your Lordships are to determine whether the question put by the counsel at the bar shall be asked.

LORD MANSFIELD—I suppose Mr. Hawkins means to demur to the question upon the ground that it came to his knowledge some way from his being employed as a surgeon for one or both of the parties, and I take it for granted, if Mr. Hawkins understands that it is your Lordships’ opinion that he has no privilege on that account to excuse himself from giving the answer, that then, under the authority of your Lordships’ judgment, he will submit to answer it. Therefore, to save your Lordships the trouble of an adjournment, if no Lord differs in opinion, but thinks that a surgeon has no privilege to avoid giving evidence in a Court of justice, but is bound by the law of the land to do it (if any of your Lordships think he has such a privilege, it will be a matter to be debated elsewhere); but if all your Lordships acquiesce, Mr. Hawkins will understand that it is your judgment and opinion that a surgeon has no privilege, where it is a material question, in a civil or criminal cause to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it. I take it for granted that, if Mr. Hawkins understands that, it is a satisfaction to him, and a clear justification to all the world. If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honour and of great indiscretion, but, to give that information in a Court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.

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Examination continued—My question is, whether you knew from either of the parties that there was a marriage between them?—From the conversation with both parties I apprehended there was a marriage, but nothing appeared in proof before me. I mean nothing as legal proof, but conversation.

But did they in conversation admit that they were man and wife, and is that the ground upon which you form that apprehension?—Yes it is; they did admit in conversation.

Do you, or do you not, know that a child was the fruit of that marriage?—Yes, I do.

Can you tell their Lordships about what time that child was born and where?—About the time I cannot tell. If I ever put down anything in writing at the time I might have destroyed it afterwards, according to my custom, which is to destroy papers that are of no use, and which might be improper to be found after my decease.

Inform their Lordships about what time this might be, as near as your memory will enable you to do?—I should suppose it was about thirty years ago, but I do protest I do not know.

Where was this child born?—At Chelsea, near to Chelsea College, but I forget the name of the street.

Was this marriage, and the birth of that child, at that time kept a secret?—I was told it was to be a secret.

Do you know what has since become of that child?—I believe it died in a little time afterwards.

By your answer, that you understood it was to be kept a secret, did you mean the marriage, or the birth of the child, or both?—Both.

Which of the parties can you recollect it was, Mr. Hervey or Miss Chudleigh, that desired this might be kept a secret, or both?—I should take for granted both equally.

Do you know enough of the then Mr. Hervey's motions to be able to inform their Lordships whether the child was born after his first or second return from sea subsequent to the marriage?—No, I do not know enough of his motions to answer this question.

Do you know what age this child had attained before its death?—I protest I do not remember now.

Can you recollect about what time of the year it was you first heard this child was born, and about what time of the year you heard it died?—I do not know, I might hear of the death immediately.

Did you ever attend the child in the course of your profession?—I did once; I am not sure whether I did not attend more, but I remember I attended it once.

Do you remember whether your recollection of this transaction was, or was not, helped about the time of the commencement of

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the suit in the spiritual Court?—Really I do not know anything that passed to bring it to my mind then.

Were you, or were you not, applied to by either of the parties, or both, at the time of the commencing this suit in the spiritual Court?—I was applied to by the Earl of Bristol.

Will you be so good as to tell what was the purport of Lord Bristol's then application to you?—

Mr. WALLACE—On the part of the noble lady, I must submit to your Lordships that nothing said in the absence of the lady is evidence against the prisoner at the bar.

Mr. DUNNING—I shall put the question in a way that it shall be liable to no objection. (*To Witness*)—Did you, or did you not, in consequence of Lord Bristol's application, apply to the lady at the bar?—I did.

Then tell us what was the purport of Lord Bristol's application to you, and what message you carried from Lord Bristol to the lady at the bar?—To the best of my remembrance the Earl of Bristol met me in the street and stopped me, telling me that he should be glad I would call on him at his house the first morning I had half an hour to spare, and that if I could then fix the time he would take care to be in the way, and that no other company should interrupt the conversation. He intimated that it was not on account of his own health, but on account of an old friend of mine. I named the time and went to him; I found his Lordship expecting me; upon a table, at a little distance from his right hand, there lay two or three bundles of papers, folded up as these papers are (taking up some papers at the bar). To these papers he often pointed in course of what he said afterwards. After making some polite apologies to me for the particular trouble he was then giving me, he told me it was on the present Duchess of Kingston's account. That he wished me to carry her a message upon a subject that was very disagreeable, but that he thought it would be less shocking to be carried by, and received from, a person she knew than from any stranger; that he had been for some time past very unhappy on account of his matrimonial connections with the Duchess, Miss Chudleigh, that was then; that he wished to have his freedom, which the criminality of her conduct, and the proofs which he had of it (which, in pointing to the papers I before mentioned, he said he had for some time past, with intent and purpose to procure a divorce, been collecting and getting together); that he believed they contained the most ample and abundant proofs, circumstances, and everything relative to such proof; that he intended to pursue his prosecution with the strictest firmness and resolution; but that he retained such a regard and respect for her, and as a gentleman to his own character, that he wished not to mix malice or ill-temper in the course of it, but that in every respect he would wish to appear

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and act on the line of a man of honour and of a gentleman; that he wished (he said) she would understand that his soliciting me to carry the message should be received by her as a mark of that disposition; that as most probably in the number of so many testimonial dispositions as were there collected there might be many offensive circumstances named, superfluous to the necessary legal proofs, that if she pleased I might inform her that her lawyers, either with or without herself, might, in conjunction with his lawyers, look over all the depositions, and that if any parts were found tending to indecent or scandalous reflections, which his gentleman of the law should think might be omitted without weakening his cause, he himself should have no objection to it; that as he intended only to act upon the principles of a gentleman and a man of honour, he should hope she would not produce any unnecessary or vexatious delays to the suit or enhance the expenses of it, as he did not intend to prosecute to gain by any demands of damages, I think, or to that purpose. I delivered this message to the Duchess as well as I could. I do not presume now that either the precise words, or the identity of the words of expressions, can be recollected by me, but it was to the purport, as near as possibly I can remember, of what I have said.

Will you recollect whether upon this conversation ^{and} distinct proposition was stated to the Duchess which required an answer, or what answer you carried back from the Duchess for that purpose? You will, of course, be referring yourself to what passed between you and the Duchess?—I delivered my message to the Duchess. After a little time taken for consideration, I do not recollect exactly what Her Grace desired me to report to the Earl of Bristol, but it was to this effect—That she was obliged to him for the polite parts of his message, but, as to the subject of the divorce, she should cut that short by wishing him to understand that she did not acknowledge him for her legal husband, and should put him to the defiance of such proof; that she had then already, or should immediately, institute a suit in the Ecclesiastical Court, which she called, I think, a jactitation of marriage; but, as he had promised before, that he would act upon the line of a man of honour and a gentleman in his own intended suit, she hoped that he would pursue the same line now, and that he would confine himself to the proofs of legal marriage only, and not to other proofs of connections or cohabitations; if he did, that he would make it a process of no long delay, and that either he would gain an equal freedom to himself by a sentence of that Court, declaring them to be free, or he would the sooner be able to institute his own intended suit. The Earl of Bristol received my message as one affected and struck by it, making no reply or answer for two or three minutes; then, not speaking to me, but rather seeming to express his own thoughts aloud in short sentences,

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that he did not conceive he should have his equal freedom by that method. I believe I should have mentioned that Her Grace desired, in part of her message, that nothing might be brought forward which might be the subject of useless conversation and scandal. He said, in reply, that he was no more inclined to bring forward anything for the lovers of scandalous conversation only than she could be, and that, if he could not establish the proof of legal matrimony (I do not remember the words but to the sense of this), that he was too much a gentleman to bring anything before the public relative to other connections with the lady. I do not remember that anything material passed, or more than this.

Do you recollect that in any subsequent conversation with the lady you were desired to apply to the gentleman for any other civility in the course of this cause?—Before the first attendance that I have lately alluded to in illness Mrs. Chudleigh, her mother, did us the honour of a private family friendship. After these messages Her Grace now and then called on my wife in an evening, frequently saying she was passing to or from her law gentleman. When I happened to see Her Grace I every now and then asked how her suit went on, to which, I think, she always seemed to answer cheerfully, “Very right” and “Well.”

Did you ever carry any other messages?—Two or three times, I cannot recollect which, she asked me to deliver some message to the Earl of Bristol; I am not sure whether one was not a letter, or whether upon the occasion of her asking me to deliver something for my own memory I might not ask her to write it down, but I really do not remember at present, though I have endeavoured to recollect what the subject of those messages was; but I know they were of very trifling import, nothing that could have struck me strongly, or I should have remembered them; and I understood they were rather given to me as if the Earl of Bristol was delicate in receiving any message from Her Grace, and that I was only to expect a verbal answer on that account.

Do you recollect whether any of these messages related to any witness or witnesses to be produced or kept back?—Certainly not; I never had a supposition that the Duchess would have given me such a message. Nothing appeared to me but what contained matter of little import and of the most honourable kind.

Did you ever observe, or do you now recollect, any ground to form a belief whether the parties had forgotten or remembered that there was then living one of the witnesses to the fact of the marriage?—I profess I do not recollect that; I have heard it in common conversation in the town, but not that ever I remember from either him or her at that time.

At what time did you receive that report from him or her?—I think I have seen the Earl of Bristol but once since the com-

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mencement of this prosecution, and then his Lordship seemed rather to speak peevishly.

LORD MANSFIELD—They will not examine to what Lord Bristol has said since the commencement of this prosecution.

Examination continued—Was anything that my Lord Bristol said on that subject communicated to the lady?—I certainly might, and did, I believe, tell Her Grace what was said.

LORD MANSFIELD—Then you may go on.

Examination continued—Then tell the House what Lord Bristol said, and you repeated to the lady?—His Lordship seemed to be peevish that such a person was now brought forward, and as he had heard it supposed, I believe, for want of her having such allowance or such care taken of her by the Duchess as he supposed she used to have. If I understood him right, the Earl of Bristol said this person had been with him to express things to that purpose, and said that if she had been as easy to come at, or had had as good a memory when that cause was carried on in the Ecclesiastical Court, that he believed the issue of it would have been different.

Will you be so good as to recollect whether you communicated this to the lady, and what passed upon that occasion?—I did communicate it to the Duchess, and I thought she was rather out of temper with the message, or with me, she calling at my house at a time I was very much in haste to go out upon business, and could not give Her Grace that time to hear what she seemed to wish to have to talk more upon it. She offered to come again, but I was then not well in my health at all, and perhaps, as she might think, not quite so civil, would not name another time with Her Grace for her to call upon me, but said that I would take an opportunity, as soon as I was able, of waiting upon Her Grace at her own house. I did do this some time after, and was told at the door that Her Grace was not at home. I left my name and said I would call again. After some days' interval I did so, and then was told that Her Grace was at home, but was laid down to sleep, from whence I concluded that I was not to call again.

Am I to understand from you that this last message from my Lord Bristol was never the conversation between you and the Duchess?—I did relate it to her during the time that she was at my house.

Have you at any time since heard anything from the Duchess on that subject?—I did hear, but not from any good authority, that Her Grace was rather angry.

Has the lady never conversed with you on the subject of this living witness to the marriage from that time to this?—I have never seen Her Grace but once since, and that was yesterday morning for a few minutes at the Duke of Newcastle's.

The Duchess of Kingston.

Cæsar Hawkins

Generally, at any time whatever have you heard anything from the Duchess on the subject of this living witness to the marriage, where she was, or anything concerning her?—I protest nothing conclusive. I might hear there was such a person, but it was never related to me, whether she was a better or worse evidence; nothing relative to that, whether she was a better or worse evidence, or that she was afraid of her, or anything to that purpose.

Am I to understand you have heard her say that there was such a witness?—In what looser conversation I cannot tell, but nothing that ever made me know that there was such a person who had much material knowledge.

I understand you, that from Lord Bristol you understood there was a surviving witness to the marriage. My question is, whether you ever learned the same thing from the lady or not?—If it was, it was some accidental looser conversation, not as trusting me with such a knowledge.

Was it then mentioned in any looser or accidental conversation, or any conversation?—I protest it is impossible to remember that with any degree of precision or of use.

I did not mean to ask you to recollect any particulars of the conversation, but simply to the point, whether the Duchess ever stated to you, or acknowledged, there was a living witness to the marriage?—No, I do not remember that she ever stated to me or said that there was a living witness to the marriage.

Is it a fact that ever you learned from the lady?—I rather (if I may say anything) understood from Her Grace that there was some looser marriage, not quite in the common manner. I think I could remember an expression of Her Grace's once, upon Her Grace's speaking on the occasion. If I remember, I asked Her Grace how her suit went on. This was towards the latter part of it. She looked grave, and desired to speak to me in another room. She said that she had had a great deal of concern and agitation of mind since she last saw me, which I remarked to her had been for a longer interval of time on her not calling at the house upon my wife in the usual manner. Her Grace said that she had had so much concern upon what she had not expected at the commencement of her suit from finding that a positive oath was expected from Her Grace that she was not married, and which she had for some time together apprehended would be put to her in that form, that she thought she would have dropped her suit entirely, for that she would not for the whole world have taken that direct kind of positive oath; but that what had been offered to her had been so complicated (I think, I understood) with other things that were certainly not true that she could and had taken the oath with a very safe conscience. To some questions—I do not remember the words to Her Grace from me—how then she

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came to institute a suit at all, she answered me, "Oh, for that matter" (I think it was) "the ceremony as done was such a scrambling, shabby business" (I do not say these were the precise words, but to that purport) "and so much incomplete that she should have been full as unwilling to have taken a positive oath that she was married as that she was not married."

I should be glad if you would tell their Lordships what it was that was so particular in this business; if the lady ever explained it to you?—I never had an explanation from that moment. I had within myself a curiosity from the time that I carried the message to my Lord Bristol from Her Grace, and his reception of it. I had rather imagined that there was some marriage of which legal proofs could not be produced, but that was only my own notion. Before that time I had no real authority at all; I did not know myself honestly what to think of it.

Did the lady ever explain to you by what reason it happened that the question, when it came to be put, came in so much more palatable a form than she expected it?—No, not in the least. I should not have presumed to have asked such a question, nor did she give me any explanation at all.

Was anything ever said by Lord Bristol, and communicated to the lady, respecting an intention of his to appeal from this sentence?—I know nothing of that.

What said Her Grace on that subject?—Her Grace had told me that the sentence was passed, and that it was irrevocable and final to them two, unless my Lord Bristol, within a certain limited time, did something to keep the cause open. I do not know what that was. That there was, she believed, some demur at that time, as my Lord Bristol was not satisfied with the sentence, and had made some demand by his proctor, if I understood right, for the costs of suit which were decreed, I believe, against him.

Do you know whether the costs of suit were ever paid by my Lord Bristol?—I do not, but I believe they were. I was going on to say what I recollected upon that. They had some demurs upon the costs of suit, but that if my Lord Bristol insisted upon it she would give her proctor directions not to let such a thing stop the closing of the suit.

Do you then know whether my Lord Bristol, who by the terms of the sentence was to pay the costs, did not, upon this, receive the costs he had been put to in the suit?—I know nothing more than I have mentioned, not a tittle more nor less.

Do you know of no other means that were used to satisfy my Lord Bristol, and to prevent this cause from continuing any longer open?—No.

Do you know nothing of any bond that was given from anybody to anybody respecting this cause and this question?—Not the least in the world.

The Duchess of Kingston.

Cæsar Hawkins

Am I to understand that you say you know nothing of any bond that has any direct, immediate, or other relation to this subject?—Not the least that ever I heard of.

You are not, then, a trustee in any such bond?—Oh no, certainly not.

Can you give us the date of the time when the first message was conveyed from Lord Bristol to the lady through you?—I was endeavouring, before I came into the Court, to recollect it, but I could not; I put nothing down in writing relative to it.

Can you recollect the year?—The message must have been immediately before the commencement of the suit, whenever that was. I presume, though you used the terms “ Her Grace ” and “ His Lordship,” you perfectly well understood that neither of the parties had a right to these appellations at the time these circumstances passed?—Yes, certainly.

Does any circumstance impress you with the recollection of the time of the year when this conversation passed, if you cannot tell us the exact year?—I might have inquired how long the suit lasted, but I protest I do not recollect now any particular circumstances to bring it to my mind.

Mr. WALLACE—My Lords, I have no question on the part of the prisoner to put to Mr. Hawkins.

By the DUKE OF ANCASTER—Did you attend the child?—I think once.

Was it a boy or a girl?—A boy.

Do you speak from your own knowledge that the child is dead?—No, but have no reasons to doubt it.

Do you know of your own knowledge that the child was the child of the prisoner at the bar?—No, I could have no proof of that, for from the time that Her Grace was brought to bed of it I never saw the child till I was sent for to it in its illness. Perhaps I had hardly ever heard of it; I had never seen it.

Did you attend the Duchess at the time she lay in?—I did not at her lying-in. I was desired, in case at any future time it had been necessary, that I should have been a witness of the birth of that child.

Did you understand that child to be the legitimate child of the Duchess of Kingston and Mr. Hervey?—I did suppose so at that time.

Were you told so by anybody?—I could not be necessarily told so at that time, because I had been told of the marriage before.

By the DUKE OF GRAFTON—Were you, from the conversation that passed with the party at that time, convinced that it was a supposed, or that it was a real, marriage; and were any expressions used relative to the concealing the birth of the child?—I understood at that time that it was a real marriage.

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Were there expressions made use of that would not have been made use of in any other circumstances?—I do not remember any particular expression at all, only that I was desired to attend, with a view and purpose that I might be a witness to the birth of that child, being, as I suppose, thought more proper as a physical man, to be in the room at the time of a delivery and the birth of a child than any other person.

By LORD LYTTELTON—Who first informed you of the marriage?—I should rather apprehend it came from the Duchess, before I saw my Lord Bristol.

Do you recollect how long that was ago?—I do not, indeed; it was a great many years ago.

Do you remember to have heard any particular circumstances related to you, by either of the parties, concerning the celebration of that marriage?—No, never more than what I have mentioned just now.

By LORD CAMDEN—Were you in the room at the time of the delivery?—To the best of my remembrance, I certainly was.

Did you ever see the child itself?—At the time of the delivery I daresay I did. Afterwards I never did, but when I was sent for on purpose to see it.

Had you then any certain knowledge of its being the prisoner's child?—It is impossible for me to say when I saw the child some months afterwards that I could know it to be the same child.

By LORD RAVENSWORTH—Did you not understand that the Duchess apprehended and was convinced that the sentence in the Ecclesiastical Court was final?—Undoubtedly so.

And that she was at liberty to marry again, unless the sentence was appealed from within a limited time?—Most certainly.

Who delivered the prisoner?—I was endeavouring to recollect before I came who was present besides myself, and who delivered Her Grace, but I protest I have forgotten it so as not to recollect. I could not recollect; it is so long ago.

THE HONOURABLE SOPHIA CHARLOTTE FETTIPLACE, examined by the ATTORNEY-GENERAL—How long have you been acquainted with the prisoner at the bar?—A great many years.

Did you know the lady before the year 1744?—My Lords, I have no other knowledge of any of the circumstances to be inquired after than what arises from my connection formerly with the lady, and unless your Lordships require it of me as a witness for justice I should wish to be excused.

LORD HIGH STEWARD—The lady must certainly disclose what she knows for the purposes of justice.

Examination continued—Did you know the prisoner at the bar before the year 1744?—I cannot recollect.

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The Hon. Sophia C. Fettiplace

Did you know the prisoner before she was Maid of Honour to the late Princess of Wales?—No, I did not.

What conversation have you ever had with the prisoner relative to her marriage with Mr. Hervey?—I believe I have heard her say that she was married to him.

Can you recollect what circumstances she has mentioned respecting that marriage, where, and at what time and before what witnesses?—In Hampshire, in a summer-house, in a garden.

Can you recollect upon what occasions these conversations have passed between you and the prisoner?—Upon my word, I cannot pretend to say that. It is long ago.

Do you recollect any conversation respecting the child which the prisoner had by Mr. Hervey?—I know nothing about it.

Can you recollect how often in conversation it has been said between the prisoner and you that she was married to Mr. Hervey?—I believe but once.

LORD BARRINGTON, examined by the SOLICITOR-GENERAL—How long have you been acquainted with the lady at the bar?—Above thirty years.

Did you ever hear from the lady at the bar that she was married to Mr. Hervey?—My Lords, I am come here in obedience to your Lordships' summons, ready to give testimony as to any matter that I know of my own knowledge, or that has come to me in the usual way, but if anything has been confided to my honour, or confidentially told me, I do hold, with humble submission to your Lordships, that as a man of honour, as a man regardful of the laws of society, I cannot reveal it.

LORD HIGH STEWARD—When the last witness but one (Mr. Hawkins) was at the bar he made something like the same excuse for not answering the questions put to him. He was then informed by a noble and learned Lord, and the whole Court agreed with the Lord, that such questions were to be answered in a Court of justice.

The WITNESS—I have no doubt but that the question is a proper question to be asked by a Court of justice, otherwise your Lordships would not have permitted it to be asked. But, my Lords, I think every man must act from his own feelings, and I feel that any private conversation entrusted to me is not to be reported again.

A LORD—His Lordship will recollect the oath that he has taken is, that he shall declare the whole truth.

The WITNESS—My Lords, as I understand the oath, I can decline answering the question that has been asked me without acting contrary to that oath, without being guilty of perjury. But, if it is the opinion of your Lordships, that I am bound by that oath to answer, and that I shall be guilty of perjury if I

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do not answer, in that case, my Lords, I shall think differently, for I will not be perjured.

DUCHESS OF KINGSTON—I do release my Lord Barrington from every obligation of honour. I wish, and earnestly desire, that every witness who shall be examined may deliver their opinions in every point justly, whether for me or against me. I came from Rome at the hazard of my life to surrender myself to this Court. I bow with submissive obedience to every decree, and do not even complain that an ecclesiastical sentence has been deemed of no force, although such a sentence has never been controverted during the space of one thousand four hundred and seventy-five years.

The WITNESS—My Lords, I do solemnly declare to your Lordships, on that oath that I have taken, and on my honour, that I have not had the least communication made to me of the Duchess of Kingston's generosity. I have not had the least communication with Her Grace by letter, message, or in any other way for more than two months; and I had no idea of being summoned as a witness here until the Easter holy days, so that Her Grace's generosity is entirely spontaneous, and of her own accord. But, my Lords, I have a doubt, which no man can resolve better than your Lordships, because your honour is as high as any men. I have a doubt whether, thinking it improper that I should betray confidential communications before the Duchess consented that I should, and gave me my liberty, whether Her Grace's generosity ought not to tie me more firmly to my former resolutions.

The DUKE OF RICHMOND—For one, I think it would be improper in the noble Lord to betray any private conversations. I submit to your Lordships that every matter of fact, not of conversation, which can be requested, the noble Lord is bound to disclose.

LORD MANSFIELD—I mean only to propose to your Lordships, to avoid adjourning to consider this question or anything further upon it at present, that the counsel might be allowed to call other witnesses in the meantime, and that Lord Barrington may have an opportunity of considering the matter, if the counsel should think proper to call his Lordship again. (This proposal was overruled).

[The counsel against the Duchess desired to withdraw the witness.]

LORD CAMDEN—My Lords, I understand from the bar that rather than your Lordships should be perplexed with any questions which may arise upon the noble Lord's difficulty in giving his evidence at the bar, the counsel would rather wave the benefit of his evidence in the cause. My Lords, if that be their resolution, and they think that, safely and without prejudice to this prosecution, they may venture to give up that evidence, your Lordships, to be sure, will acknowledge the politeness of the surrender. But, my Lords, now I am upon my legs, you will give me leave to make

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one short remark on this proceeding, and to hope that your Lordships, sitting in judgment on criminal cases, the highest and most important, that may affect the lives, liberties, and properties of your Lordships, that you shall not think it befitting the dignity of this High Court of Justice to be debating the etiquette of honour at the same time when we are trying lives and liberties. My Lords, the laws of the land—I speak it boldly in this grave assembly—are to receive another answer from those who are called to depose at your bar than to be told that in point of honour and of conscience they do not think that they acquit themselves like persons of that description when they declare what they know. There is no power of torture in this kingdom to wrest evidence from a man's breast who withholds it. Every witness may undoubtedly venture on the punishment that will ensue on his refusing to give testimony. As to casuistical points, how far he should conceal or suppress that which the justice of his country calls upon him to reveal, that I must leave to the witness's own conscience.

LORD LYTTTELTON—The laws of the land have spoken clearly on this occasion, and, if your Lordships had applied them to the noble Lord at the bar, he has told your Lordships that he is willing to submit to your judgment. But, my Lords, it is yet a question whether or not the noble Lord will be perjured. It is a question not decided by your Lordships that he will be perjured if he refuses to betray a confidence. I am sure that I feel, and I apprehend your Lordships as men of honour feel, the full weight of the noble Lord's objection; he will speak to matters of fact, but he does not desire to speak merely to conversation, and, my Lords, I am not surprised that he should make that objection, for, if you consider how loose and inaccurate all evidence of conversation must be, it takes off in a Court of justice much from its availment. The noble Lord has told you that confidential conversation may have passed between him and the noble lady at the bar. He has stated to you his doubts, and I apprehend he is not obliged to go on with his evidence until your Lordships have unanimously pronounced that it is your opinion that he is obliged to do so.

LORD HIGH STEWARD—If the counsel for the prosecution say that they have no questions to ask the noble Lord, he may withdraw.

The WITNESS—My Lords, might I be allowed to say a word or two before I withdraw from this bar? It is impossible that any person can revere this High Court, indeed, any Court of justice in this country, more than I do. It is not, my Lords, from contumacy, of which I am incapable. It is not with any view or purpose that your Lordships would disapprove, as individuals, I am certain, that I have taken the part which I have

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done. I do not say that there are no cases in which a person ought not to reveal private conversation. There are cases, in my opinion, in which he should. There are cases, in my opinion, in which he should not. And, my Lords, no person can draw the line but himself. But, my Lords, I have recollected (I am obliged to the counsel for the prosecution, who are willing to admit me to withdraw. I return them my thanks. I daresay in that they have consulted my feelings as much as they could, consistent with the duties of their station). But I have recollected, my Lords, since the generous manner in which the Duchess of Kingston has been pleased to absolve me from all ties, I have recollected that she said she wished and desired that I might say anything. If Her Grace thinks that anything I can say, consistent with the truth, can tend to her justification, I am then ready to be examined to private communications.

The SOLICITOR-GENERAL—I do not desire to examine the noble Lord. I stated to your Lordships that I do not think the cause in which my duty engages me will at all suffer by having deference to any difficulty that the noble Lord may entertain. I will not examine the noble Lord on the concession of the lady at the bar. The noble Lord stands at your Lordships' bar a witness. Having taken the oath, though I do not examine him, the prisoner may.

Mr. WALLACE—At the same time that I express my astonishment at the offer, Lord Barrington is not called to the bar as a witness for the prisoner. The noble lady at the bar has her witnesses, in her turn, to call, with which she shall trouble your Lordships.

The DUKE OF RICHMOND—I do not look on a witness at the bar to be the witness of the counsel, or of the prisoner, but the witness of the House. I shall, therefore, ask a question or two of the noble Lord. I will not distress the noble Lord's feelings by inquiring into confidential matters. I will merely ask questions of fact. The first question I would ask the noble Lord is whether he knows any fact by which he is convinced that Mr. Hervey was married to Miss Chudleigh.

The WITNESS—I do not know of any fact which will prove the marriage between the Duchess of Kingston and Mr. Hervey of my own knowledge.

The DUKE OF RICHMOND—The noble Lord must leave it to the House to judge whether it will or not. But does his Lordship know any fact relative to that matter?

The WITNESS—I do not know anything of my own knowledge that can tend to prove that marriage. I know nothing but what I have heard in the world, and from conversation.

LORD RADNOR—I am afraid your Lordships, by your acquiescence, have admitted a rule of proceeding here which would not be admitted at any inferior Court in the kingdom. I desire,

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therefore, to ask the noble Lord whether he knows any matter of fact relative to that marriage.

The WITNESS—My Lords, if I do, I cannot reveal it, nor can I answer the question without betraying private conversation.

After an adjournment—

LORD HIGH STEWARD—My Lord Viscount Barrington, I am commanded by the Lords to acquaint your Lordship that it is the judgment of this House that you are bound by law to answer all such questions as shall be put to you. Has the counsel for the prosecution any question to put to the witness at the bar?

The SOLICITOR-GENERAL—We shall not ask the noble Lord any questions.

LORD HIGH STEWARD—Has the counsel for the prisoner any question to put to the witness at the bar?

Mr. WALLACE—Not any.

LORD RADNOR—Does the witness know from conversation with the lady at the bar that she was married to the Earl of Bristol?

The WITNESS—My Lords, I have already told your Lordships the motives which induce me to think that I cannot, consistent with conscience, with honour, or with probity, answer such questions as will tend to disclose confidential communications made to me. At the same time I informed your Lordships that, if the oath went so far as that I should break that oath, if I did not answer all questions which could be put to me; if that was the determination of your Lordships, I said I would not break my oath. My Lords, I continue in the same opinion and principle. My own judgment, as far as it guides me, which is very imperfectly, does tell me that I am not obliged to answer all questions that can be put to me. But, my Lords, though nobody can draw the line of conscience, of honour, and of probity in this case but myself, yet in point of law, and in interpretation of law, and the oath I have taken, I am desirous of assistance from those who can best give it to me, and I had much rather trust almost any man's judgment than my own. I do not dare ask again your Lordships' opinion on that point. But, my Lords, might I be permitted to apply to the learned counsel who are near me? If it is the opinion of the learned counsel that I am obliged by my oath to answer the noble Lord's question, I will readily answer it.

LORD EFFINGHAM—I apprehend that no question can be put in this Court on a matter of law to the counsel at the bar.

The WITNESS—My Lords, I have put the question to the Attorney-General, and I give him my thanks. He says he thinks I am obliged by my oath to answer all questions. That being the case, I have nothing more to say than humbly to beg your Lordships' pardon for having given you so much trouble, and

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to beg and entreat that you will believe that nothing but the tenderest and the strongest feelings, and the most determined resolution to do what was right in my situation, could have induced me to give you so much trouble.

LORD RADNOR—Whether his Lordship knows from conversation with the lady at the bar that she was married to the Earl of Bristol?

The WITNESS—My memory I have found by long experience to be a very erroneous one, and especially with relation to things past long ago. To the best of my memory and belief, the Duchess has never honoured me with any conversation on the subject for many, many years past; I believe I might say for above twenty years past. And, my Lords, that being the case, I must answer that question very doubtfully, but after the solution which the learned counsel have given to my doubts, I mean not to conceal anything from your Lordships. Thinking it right to be examined, I think it right to give frank answers, and any doubt in anything I say will arise from my not remembering well the circumstances. The Duchess of Kingston (I should not say too much if I was to say thirty years ago) did entrust me with a circumstance in her life relative to an engagement of a matrimonial kind with the Earl of Bristol, then Mr. Hervey.

LORD RADNOR—Whether his Lordship understood that that matrimonial engagement which had already passed was a marriage?

The WITNESS—I understood there had been a matrimonial engagement entered into, but whether it amounted to a legal marriage or not I am not lawyer or civilian enough to judge.

LORD RADNOR—Did his Lordship ever understand that there was issue of that marriage?

The WITNESS—Upon my word, I cannot say; I do not know that the Duchess ever made any communication of that sort to me. I had heard of it in the world, but I do not know that the Duchess ever communicated to me the circumstance of her having had any issue.

LORD RADNOR—Does his Lordship know anything of a bond entered into on the part of the prisoner at the bar of late years relative to the suppression of evidence, or the payment of costs of suit in the Ecclesiastical Court?

The WITNESS—I never had the least communication from the Duchess of Kingston or from any person relative to anything of the kind. I do not recollect that I ever heard of any such thing even in the world, and the Duchess of Kingston has never communicated to me, in the course of her life, to the best of my memory or belief, anything which was, at the time she was pleased to communicate it to me, in the least a deviation from the strictest rules of virtue and religion.

The Duchess of Kingston.

Judith Phillips

JUDITH PHILLIPS, examined by Mr. DUNNING—You were the widow of Mr. Amis, were you not?—Yes.

Mr. Amis was parson of the parish of Lainston, in Hampshire?—Yes.

Did you know a family of the name of Merrill?—I did.

Was, or was not, Mr. Merrill's house in that parish?—It was.

How long since did your husband die?—Seventeen years ago.

Do you know the lady at the bar?—Very well.

How long have you known the lady at the bar?—About thirty years.

Were you privy to her marriage in your husband's lifetime?—I was not at the wedding, but I heard my husband say he married them.

Had you not any other means of knowing that fact from the lady at the bar herself?—Yes.

Do you remember the lady at the bar coming to Winchester?—Very well.

When?—She came about the middle of February, 1759.

Was that in your husband's lifetime or since his death?—In my husband's lifetime.

Was it long before, and how long before, Mr. Amis's death?—Six weeks.

What was the occasion of the lady's visit to Winchester?—For a register of her marriage.

If you recollect any particulars of what passed upon that occasion, state them?—She came to the Blue Boar in Kingsgate Street, Winchester, and sent for me by six o'clock in the morning. When I went to her she asked me if I thought Mr. Amis would give her a register of her marriage. I told her I thought he would. Then I asked her to my house, and when she came she asked me to go up with her to Mr. Amis and ask if he would see her and give her a register of her marriage. I went up to Mr. Amis and told Mr. Amis what the lady had desired. Mr. Amis desired to see the lady. Then I came down and told her that Mr. Amis at that time was confined to his bed. The lady went to Mr. Amis and told Mr. Amis her request. Then Mr. Merrill and the lady consulted together whom to send for, and they desired me to send for Mr. Spearing, the attorney. I did send for him, and during the time the messenger was gone the lady concealed herself in a closet. She said she did not care that Mr. Spearing should know that she was there. When Mr. Spearing came Mr. Merrill produced a sheet of stamped paper that he brought to make the register upon. Mr. Spearing said it would not do, it must be a book, and that the lady must be at the making of it. Then I went to the closet and told the lady; then the lady came to Mr. Spearing, and Mr. Spearing told the lady a sheet of stamped

The Trial.

Judith Phillips

paper would not do, it must be a book. Then the lady desired Mr. Spearing to go and buy one. Mr. Spearing went and bought one, and, when bought, the register was made. Then Mr. Amis delivered it to the lady; the lady thanked him, and said it might be a hundred thousand pounds in her way. At the same time she added that she had had a child by Mr. Hervey, and that it was a boy, but that it was dead, and that she had borrowed a hundred pounds of her aunt Hanmer to buy baby things. Before Mr. Merrill and the lady left my house the lady sealed up the register and gave it to me, and desired I would take care of it until Mr. Amis's death, and then deliver it to Mr. Merrill.

Did it accordingly remain in your hands until your husband's death, and then did you deliver it to Mr. Merrill?—I did.

Do you recollect whether Mr. Merrill accompanied the lady from the time you first saw her in Winchester to your husband's house, or did Mr. Merrill join them afterwards when they were there?—He joined them afterwards.

Do you remember whether any other entry was then made in the register book besides the entry of this marriage?—I don't remember any.

Do you recollect to have seen anything of the lady at the bar since your husband's death?—Many times.

Do you recollect any conversation that has passed between you at any of those times?—After I had delivered the register to Mr. Merrill I waited upon the lady at her house at Knightsbridge, and found her in the garden. I told her I had delivered the register to Mr. Merrill. She thanked me for it, and desired I would take no notice of it; at the same time she said Mr. Swino was in the garden, and hoped I would take no notice to him of the affair.

Do you recollect any further conversation about this book, after Mr. Merrill's death, with the lady?—I was once a-fishing with the lady, and she told me some things that had passed in the family. She told me that Mrs. Bathurst had used her very ill, for she had got all the papers Mr. Merrill had of hers at the time of his death. Upon which I asked her what was become of the register. She told me the minister of the parish had it.

Was, or was not, the Mrs. Bathurst you have spoken of the daughter of that Mr. Merrill?—She was.

Do you recollect any other conversation with the lady at the bar after her marriage with the Duke of Kingston?—Yes; I waited upon her in Arlington Street, after her marriage with the Duke of Kingston. She said to me, "Was it not very good-natured of the Duke to marry an old maid?" I looked her in the face and smiled, but said nothing then. She asked me if Mr. Hervey had sent to me at the time of her trial. I said he had not sent to me.

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The Duchess of Kingston.

Judith Phillips

(The book shown to the witness)—Can you be sure whether that is the book you have been speaking of?—I am very sure.

I believe there are the vestiges of the seals about it still?—There are.

Where it was sealed up?—Yes.

Look at the entries in the book; are they not your husband's writing, and were they not made in your presence?—They are my husband's handwriting, and they were made in my presence.

They were made likewise in the presence of the lady at the bar, were they not?—They were.

(Clerk reads)—“Marriages, births, and burials in the Parish of Lainston. 2nd of August, Mrs. Susannah Merrill, relict of John Merrill, Esq., buried. 4th of August, 1744, married the Honourable Augustus Hervey, Esq., in the Parish Church of Lainston, to Miss Elizabeth Chudleigh, daughter of Colonel Thomas Chudleigh, late of Chelsea College, deceased. By me, Thomas Amis.”

Mr. DUNNING—My Lords, I have done with this witness.

LORD HIGH STEWARD—Would the counsel for the prisoner ask this witness any questions?

Cross-examined by Mr. MANSFIELD—I should be glad first to see the book. (*To Witness*) I should wish to know by what means you now subsist; what support you have?—Upon my own private fortune.

Where do you live?—At Bristol.

Is your husband living or dead?—Alive.

What employment was he in before he lived at Bristol; upon his fortune?—He was steward to the Duke of Kingston, and a grasier.

Was he not turned out of the service of the Duke of Kingston?—I believe he was not turned out.

Do not you know whether he was or not?—He wrote a letter to the Duke, and desired to leave him.

Do you know, then, that he was not turned out?—Yes.

Had he been threatened to be turned out before he sent the letter?—Not that ever I heard of.

Had your husband had any differences or disputes with the Duke of Kingston?—No, not that I know.

Was his reason then for quitting the service of the Duke of Kingston merely his own inclination, without any particular reason or cause?—He thought the Duke looked cool upon him. For what reason he could not tell.

Had the Duke ever expressed any cause of dislike to him?—Not that I know of.

How long have you left Bristol?—About four months.

Where have you lived?—Sometimes in one place, sometimes in another.

The Trial.

Judith Phillips

In what places?—Sometimes at the Turf Coffee-house, sometimes in St. Mary Axe.

How much of the time at the Turf Coffee-house?—I really cannot say exactly.

You are not asked as to a week. Have you lived there the greater part?—The greater part.

Who has supported you at the Turf Coffee-house?—Ourselves.

Have you paid the expenses of your support there?—That I do not know anything of.

Do you not know that the whole of your expense at the Turf Coffee-house is to be defrayed by the prosecutor, Mr. Evelyn Meadows?—I do not know it is.

Have you not understood so?—I have not.

Nor do you believe it?—I cannot tell what to believe, or what is to be done.

Cannot you tell whether you believe that your expenses at the Turf Coffee-house are to be defrayed by Mr. Meadows?—No, I do not. I do not know anything of that.

Do you not know by whom you expect the expense of your support at the Turf Coffee-house is to be paid?—I do not know by whom it is to be paid.

Have you seen Mr. Evelyn Meadows at the Turf Coffee-house?—I have.

How often may you have seen that gentleman there?—I cannot tell.

Many times, or only once or twice?—I may have seen him twice or three times.

Have you not seen him oftener than that there?—I have seen him frequently in the yard.

Have you not had frequent conversations with him?—Not frequent.

Have you not conversed with him sometimes at the Turf Coffee-house, sometimes at other places?—Nowhere but at the Turf Coffee-house.

Who has been present at such conversations?—My husband.

Who else?—No one else.

Has not Mr. Fozard been present in some of the conversations?—Never.

Have you not been at Mr. Fozard's house with Mr. Meadows?—Never; by accident on Christmas Day I called at his door, and he was there.

Were you in company with Mr. Meadows at Mr. Fozard's?—I was.

Does Mr. Fozard assist Mr. Meadows in the course of this prosecution?—I know nothing of that.

Do not you know that Mr. Fozard has assisted Mr. Meadows in looking out for witnesses?—I don't know anything about it.

The Duchess of Kingston.

Judith Phillips

Have you not yourself been present at conversations with Mr. Fozard about this prosecution?—Nothing, but what was merely accidental.

How often has that accident happened that you have been present at conversations with Mr. Fozard about this prosecution?—I never was at Mr. Fozard's but twice.

Has Mr. Fozard been at the Turf Coffee-house with you?—He came to see Mr. Phillips when he had the gout.

How often might Mr. Fozard visit you at the Turf Coffee-house?—He came to see Mr Phillips, but not me.

How often might he visit Mr. Phillips there?—About three times.

Have you ever met Mr. Fozard at any other places besides the Turf Coffee-house and his own house?—Never.

Do you know of any promise made to you or your husband of any benefit or advantage depending upon the event of this prosecution?—None in the world.

Did you never hear of any such promise being made to you or your husband?—Never.

Have you never said that any such promise or offer was made?—Never, nor it never was.

Have you never said anything to that purpose?—No, never to anybody.

Have you never made any mention of any kind of benefit or advantage you were to receive from the evidence you should give on this prosecution?—Not in the least; I don't want it, nor wish it.

Did I understand you right when you said that at the time of the entry of the marriage in this register no other entry was made?—I don't remember that; I remember very well standing at the bed's feet when the register was made.

Do not you know whether any other entry was made at that time?—I don't, for I was backwards and forwards in the room.

How come you then to know that the register of this marriage was made in the book at that time?—I saw it.

Did you read it at that time?—I heard Mr. Amis read it.

Did you hear him read anything else besides the entry of the marriage?—Nothing but that, for I was going backwards and forwards in the room.

Do you know nothing at all, whether anything was entered besides that at the time of the marriage?—I did not see anything but that, though it might, as I was going backwards and forwards.

Did you see the entry of the marriage in the book?—I did.

If you saw that, must not you have seen whether there were any other entries made on the same leaf?—I heard it read; I never saw it afterwards, but when the lady sealed it up.

Did not you take notice that there were other entries?—I did not.

The Trial.

Judith Phillips

You took notice of nothing upon the paper but the entry of this marriage?—Of nothing else.

Did you keep the paper long enough before you, or did the lady at the bar keep the book long enough before her for to see whether what she heard read was written on the paper?—She held it in this manner (describing the manner) open, and I saw it as I stood by her; I did not read it, but heard it read.

Did all the persons who were present hear what was said about the hundred pounds lent by Mrs. Hanmer?—No, they did not; the lady said she had borrowed a hundred pounds of her aunt Hanmer to buy baby things.

Who did the lady tell that to?—To Mr. Amis and to me.

Did she speak it loudly or softly, or how?—She spoke it as she was sitting by the bedside talking to Mr. Amis.

When did you tell anybody of such register?—I really cannot say exactly when, but I have said I had it in my possession.

When did you first mention it?—I cannot tell.

Was Mr. Merrill present at the time when this entry was made in the register?—He was.

Was he in the room the whole time that this conversation passed that you have mentioned of lending a hundred pounds by Mrs. Hanmer?—No, he was not.

Did Mr. Merrill come with the lady, or the lady before him, or without him?—The lady before him, for Mr. Merrill was gone to Lainston to his seat.

When Mr. Merrill came, did not the lady repeat the conversation that had been about the child and the hundred pounds?—There was nothing of that said before Mr. Merrill.

Was anything said about making any other entry in the register, besides that of the marriage?—Nothing that I heard.

When did Mr. Merrill come into the room, before the entry was made in the book, or after?—Before.

Was Mr. Merrill in the room at the time that it was made?—He was.

Who was it brought the stamp paper?—Mr. Merrill.

Was Mr. Merrill in the room when the lady concealed herself, as you have said?—He was.

Who else was in the room?—No one except myself.

Now, look at the book?—I know the hand perfectly well.

Is the whole of that which is written on that leaf the writing of your husband?—It is.

You have said that you went down to Arlington Street, can you name any person that you saw there?—No one was in the room when I went except the lady.

Can you name any person that you saw there?—Only a servant for some time, and then a milliner came.

Can you name those persons?—I can't; I don't know them.

The Duchess of Kingston.

Judith Phillips

Can you name neither of them?—The servant was Fozard.

Can you name no other servants that you saw there?—No; I had an inflammation in my eye, and the lady was exceedingly kind to me; she ordered an egg to be boiled for me, and Fozard brought it, in order that it might be opened and laid on my eye.

Can you name any other servants whom you saw there?—I don't remember.

LORD CAMDEN—My Lords, I observe in the entry of the register the words "was married" are struck through with a black line; I want to know of the witness whether she can account for that stroke.

The WITNESS—I cannot.

Mr. DUNNING—It is a repetition. There is marriage written in the margin. "August the 24th, married." The entry then proceeds, "The Honourable Augustus Hervey, Esq., was married," which being a repetition, I suppose, they struck that through with a black line.

The Rev. STEPHEN KENCHEN, examined by Mr. DUNNING—You succeeded Mr. Amis in the church at Lainston, I believe?—I did.

When did you first see that book that he has in his hand, and how did it come there?—The first time that I saw the book was after the death of Mrs. Hanmer, aunt to Mr. Merrill, who was buried in the vault of that little church.

By whom was that book produced to you, and for what purpose?—In order to register Mrs. Hanmer's burial.

By whom?—By Mr. Merrill.

Did you accordingly make an entry of the burial of Mrs. Hanmer?—I made an entry of the burial of Mrs. Hanmer.

What then became of the book?—Mr. Merrill carried it back again to his own house.

When did you next see the book?—At the death of Mr. Merrill.

By whom was the book then produced to you?—I cannot say; either by Mr. or Mrs. Bathurst, or in the presence of them both.

Did you then make an entry of the burial of Mr. Merrill?—I did.

What then became of the book?—I have had it in my possession ever since.

Mr. WALLACE—I have no questions to put to this witness.

The Rev. JOHN DENNIS, examined by Mr. DUNNING—Look at that book. Were you acquainted with the handwriting of the late Mr. Amis? You knew Mr. Amis, I presume?—I knew him perfectly well.

Do you know his handwriting when you see it?—I have seen his handwriting often, as succeeding him in the living.

The Trial.

Rev John Dennis

Did you ever see him write?—I have seen him write, but not often.

Look at that handwriting; tell me whether you believe the two entries in the first page of that book are his handwriting?—Yes, particularly his name, Thomas Amis, seems very much so.

Do you believe it to be his handwriting?—I believe the whole to be his handwriting.

Mr. DUNNING—I do not know whether, on the part of the prisoner, they mean to put us on the proving, which it is necessary for us to do if they require it, the marriage with the Duke of Kingston.

Mr. WALLACE—We are very ready to admit that fact. There is no doubt of her being married by the licence of the Archbishop of Canterbury.

Mr. DUNNING—You will give us the date.

Mr. WALLACE—Mention what the day is.

Mr. DUNNING—The 8th of March, 1769, I understand.

My Lords, we are now going to prove a caveat, entered by the lady, upon the apprehension of a suit intended to be instituted by Mr. Hervey in the spiritual Court.

Mr. JAMES, examined by Mr. DUNNING—Do you know anything of the caveat entered at Doctors' Commons on the part of the lady at the bar?—Yes, the caveat is entered in this book (producing it).

Is that the proper book in which such entries ought to be made?—It is.

The caveat was read by the Clerk, and is as follows:—"The 18th of August, 1768. Let no citation, intimation, or other process, or any letters of request for the same, to any other Judge or jurisdiction whatsoever, issue under the seal of this Court at the suit or instance of the Honourable Augustus John Hervey, or his brother, against the Honourable Elizabeth Chudleigh, spinster, of any cause or suit matrimonial, without due notice being given to Mr. Nathaniel Bishop, proctor for the said Honourable Elizabeth Chudleigh, who, on his being warned thereto before the Judge of this Court, or his lawful surrogate, will be ready by himself for counsel to show just cause of this same caveat, and why no such process of letters of request should issue thereupon."

Mr. WALLACE—The witness merely produces the book; he knows nothing of the fact of the entry being made.

The WITNESS—I know Mr. Bishop's clerk's hand; this is his handwriting.

Mr. DUNNING—Perhaps the witness may know that Mr. Bishop was the proctor employed by the lady in the course of that suit?

The WITNESS—I have heard so.

The ATTORNEY-GENERAL—That appears on the record they have put in.

The Duchess of Kingston.

Mr James

Mr. DUNNING—I understand that it is the pleasure of some of your Lordships that we should go into the proof of the marriage of the Duke of Kingston.

Mr. WALLACE—It is admitted on the part of the prisoner.

Mr. DUNNING—But as some of the Lords wish for the proof, we will examine it.

The Rev. JAMES TREBECK, examined by Mr. DUNNING—Be so good as find the register of the marriage of the Duke of Kingston.—(Points it out.)

Clerk reads—“ No. 92. Marriages in March, 1769. No. 92. The most noble Evelyn Pierrepont, Duke of Kingston, a batchelor, and the Honourable Elizabeth Chudleigh of Knightsbridge, in St. Margaret’s, Westminster, a spinster, were married by special licence of the Archbishop of Canterbury this 8th of March, 1769, by me, Samuel Harpur, of the British Museum. This marriage was solemnised between us.

“ KINGSTON.

“ ELIZABETH CHUDLEIGH.

“ In the presence of

“ Masham.

“ J. Ross Mackye.

“ William Yeo.

“ E. R. A. Laroche.

“ A. K. F. Gilbert.

“ Arthur Collier.

“ James Laroche, jun.

“ C. Masham.”

“ Alice Yeo.

Mr. DUNNING—I am desired to apprise your Lordships of a fact, which may or may not be proved if thought necessary. Your Lordships have heard in the evidence of the last woman an account of a certain Mr. Spearing, who was present. That Mr. Spearing could not be found. He, though Mayor of Winchester, is now found to be amusing himself somewhere or other beyond sea, God knows where. We have witnesses to give your Lordships that account, if your Lordships think it necessary. Will your Lordships now please to hear the Rev. Mr. Harpur?

The Rev. Mr. HARPUR, examined by Mr. DUNNING—Did you perform the marriage ceremony between these parties?—Yes.

At the time mentioned in the register?—Yes.

Mr. WALLACE—I beg Mrs. Phillips be called to the bar, that a letter may be produced to her, and that she may say whether it is her handwriting.

Mrs. PHILLIPS, examined by Mr. WALLACE—Is that your handwriting?—The name is my handwriting.

Is that your letter?—It is my letter.

The Trial.

Mrs Phillips

[A letter from Judith Phillips to Her Grace the Duchess of Kingston read—]

My Lady Duchess,

I write Your Grace this letter. My heart has ever been firmly attached to Your Grace's interest and pleasure, and my utmost wish to deserve your favour and countenance. Suffer me not then in my declining years to think I have forfeited that favour and protection, without intentionally giving the most distant cause.

May I entreat Your Grace to accept this as a sincere and humble submission for any failure of respect and duty to Your Grace; and permit me most humbly to entreat Your Grace's kind intercession with my Lord Duke to continue Mr. Phillips his steward, whose happiness consists in acting and discharging his duty to His Grace's pleasure. This additional mark of Your Grace's goodness we hope to be happy in, and in return the remainder of our lives shall be passed in gratitude and duty. The person who carries this will wait to receive Your Grace's pleasure and commands to her, who remains, with the greatest respect,

My Lady Duchess,

Your Grace's most dutiful servant,

J. PHILLIPS.

The ATTORNEY-GENERAL—The evidence, your Lordships will recollect, given by the witness was in answer to a question whether her husband had or had not been turned out of his place, pointing the question so as to give your Lordships and to give the witness to understand that they meant the circumstances of being turned out of his place should go personally to the discredit of her husband, and also imply some memory of that in the wife. The witness, in answer to that, told your Lordships, with respect to such part of it as might be deemed to relate to her husband's credit in the business, that he had resigned his place under the Duke. The letters which I have in my hand, and will just state to your Lordships, if it be thought necessary before the calling of the witness, is that very correspondence, by which it appears that he did so resign his employment under His Grace into His Grace's hands. He wrote to His Grace at Newmarket from Holm Pierpont. The letter is dated the "17th of October, 1771." And he writes thus—

Nov. 7, 1771.

I have ever done my duty with the strictest regard to Your Grace's interest, and with the most perfect respect. I have declined accepting a good settlement, to act conformable to Your Grace's pleasure, which Her Grace was pleased to promise should be made up to me, which must have escaped Her Grace's memory, as I have since had my rent considerably raised, and am much concerned to observe lately Your Grace's displeasure;

The Duchess of Kingston.

The Attorney-General

and being conscious of a faithful discharge of my duty, I must be unjustly represented to Your Grace. I hope Your Grace will be pleased to permit my delivering up the charge of Your Grace's affairs, which, as an honest man, I can only properly keep, while satisfied myself, and honoured with Your Grace's approbation, &c.

In answer to which he received this letter—

Mr. Phillips,

Your letter came to me at Newmarket. After what has passed there is no occasion for many words. Sherin will be at Holm Pierrepont some time next week, with my orders about settling your business, which I flatter myself you will readily comply with.

I am, yours, &c., &c.

I believe I may refer to your Lordship's memory that Mrs. Phillips mentioned His Grace's having looked coolly on her husband, which occasioned his resignation.

A PEER—What is that, Mr. Attorney-General, that you have been reading?

THE ATTORNEY-GENERAL—The first is a copy of a letter to the Duke; the other the Duke's original answer. If it is thought material enough to trouble your Lordships with it, we can easily prove that this is His Grace's handwriting, and this the copy of His Grace's letter, which was all that was necessary.

Adjourned.

The Trial.

Fifth Day—Monday, 22nd April, 1776.

The DUCHESS OF KINGSTON—My Lords, this my respectful address will, I flatter myself, be favourably accepted by your Lordships. My words will flow freely from my heart, adorned simply with innocence and truth. My Lords, I have suffered unheard-of persecutions; my honour and fame have been severely attacked; I have been loaded with reproaches; and such indignities and hardships have rendered me the less able to make my defence before this august assembly against a prosecution of so extraordinary a nature, and so delivered. With tenderness consider how difficult is the task, of myself to speak, nor say too little nor too much. Degraded as I am by adversaries, my family despised, the honourable titles on which I set an inestimable value, as received from my most noble and late dear husband, attempted to be torn from me. Your Lordships will judge how greatly I stand in need of your protection and indulgence. Were I here to plead for life, for fortune, no words from me should beat the air. The loss I sustain in my most kind companion and affectionate husband makes the former more than indifferent to me, and, when it shall please Almighty God to call me, I shall willingly lay that burden down. I plead before your Lordships for my fame and honour.

Logic is properly defined and well represented in this High Court. It is a talent of the human mind and not of the body, and holds a key which signifies that logic is not a science itself, but the key to science; that key is your Lordships' judicial capacity and wisdom. On the left hand is represented a hammer, and before it a piece of false, and another of pure gold. The hammer is your penetrating judgment, which, by the mercy of God, will strike hard at false witnesses who have given evidence against me, and prove my intention in this pending cause as pure as the finest gold, and as justly distinguished from the sophistry of falsehood.

Your unhappy prisoner is born of an ancient, not ignoble, family; the women distinguished for their virtue, the men for their valour; descended in an honourable and uninterrupted line for three centuries and a half. Sir John Chudleigh, the last of my family, lost his life at the siege of Ostend, at eighteen years of age, gloriously preferred to die with his colours in his bosom rather than accept of quarter of a gallant French officer, who, in compassion to his youth, three times offered him his life for that ensign, which was shot through his heart. A happy death! That saves the blush he would now feel for the unheard-of injuries and dishonour thrown on his unfortunate kinswoman, who is now at the bar of this right honourable House.

The Duchess of Kingston.

Duchess of Kingston

His Grace the late Duke of Kingston's fortune, of which I now stand possessed, is valuable to me, as it is a testimony to all the world how high I was in his esteem. As it is my pride to have been the object of affection of that virtuous man, so shall it be my honour to bestow that fortune to the honour of him who gave it to me, well knowing that the wise disposer of all things would not have put it in his heart to prefer me to all others, but that I should be as faithful a steward as I was a faithful wife, and that I should suffer others more worthy than myself to share these his great benefits of fortune.

I now appeal to the feelings of your own hearts whether it is not cruel that I should be brought as a criminal to a public trial for an act committed under the sanction of the laws—an act that was honoured with His Majesty's most gracious approbation, and previously known and approved of by my Royal mistress, the late Princess Dowager of Wales, and likewise authorised by the ecclesiastical jurisdiction. Your Lordships will not discredit so respectable a Court and disgrace those judges who there so legally and honourably preside. The judges of the Ecclesiastical Court do not receive their patents from the Crown, but from the Archbishops or Bishops. Their jurisdiction is competent in ecclesiastical cases, and their proceedings are conformable to the laws and customs of the land, according to the testimony of the learned Judge Blackstone (whose works are as entertaining as they are instructive), who says, "It must be acknowledged to the honour of the spiritual Courts that, though they continue to this day to decide many questions which are properly of temporal cognisance, yet justice is in general so ably and impartially administered in those tribunals (especially of the superior kind) and the boundaries of their power are now so well known as established that no material inconvenience at present arises from their jurisdiction. And, should an alteration be attempted, great confusion would probably arise in overturning long-established forms, new modelling a course of proceedings that has now prevailed for seven centuries." And I must here presume to add, as founded on truth, that that Court (of which His Majesty is the head) cannot be stopped by any authority whatsoever while they act in their own jurisdiction. Lord Chief Justice Hale says, "Where there has been a sentence of divorce (which is a criminal case), if that sentence is suspended by an appeal to the Court of Arches (as a superior Court), and while that appeal is depending, one of the parties marries again, the sentence will be a justification within the exception of the Act of Parliament, notwithstanding that the sentence has been appealed from, and consequently may be reversed by a superior Court." And, my Lords, how much more reason is there for its coming within the exception of the Act in my case, since no appeal has been made?

Engraved for the Lady's Magazine.



Elizabeth, Duchess of Kingston
taken at the Bar of the House of Lords.

April 15, 1776.

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The Duchess of Kingston.

The Trial.

Duchess of Kingston

I earnestly look up to your Lordships for protection, as being now a sufferer for having credit to the Ecclesiastical Court. I respectfully call upon you, my Lords, to protect the spiritual jurisdiction and all the benefit of religious laws, and me, an unhappy prisoner, who instituted a suit of jactitation upon the advice of a learned civilian, who carried on the prosecution from which I obtained the sentence that authorised your prisoner's marriage with the most noble Evelyn Duke of Kingston, that sentence solemnly pronounced by John Bettsworth, Doctor of Laws, Vicar-General of the Right Reverend Father in God Richard by Divine Permission Lord Bishop of London, and Official Principal of the Consistorial Court of London, the Judge thereof, calling on God, and setting him alone before his eyes, and hearing counsel in that cause, did pronounce that your prisoner, then the Honourable Elizabeth Chudleigh, now Elizabeth Dowager Duchess of Kingston, was free from all matrimonial contracts or espousals, as far as to him at that time appeared, more especially with the said Right Honourable Augustus John Hervey.

Had this prosecution been set on foot merely for the love of justice or good example to the community, why did they not institute their prosecution during the five years your prisoner was received and acknowledged the undoubted and unmolested wife of the late Duke of Kingston?

The preamble of the very Act on which I am indicted plainly and entirely precludes your prisoner: it runs thus, "Forasmuch as divers evil disposed persons, being married, run out of one county into another, or into places where they are not known, and there become to be married, having another wife or husband living, to the great dishonour of God, and utter undoing of divers honest men's children, and others," &c. And as the preamble has not been considered to be sufficient in my favour to impede the trial, I beg leave to observe how much your prisoner suffers by being produced before this noble House, on the penalty of an Act of Parliament, without benefitting by the preamble, which is supposed to contain the whole substance, extent, and meaning of the Act.

Upon your wise result on my unhappy case you will bear in your willing remembrance that the orphan and widow is your peculiar care, and that you will be tender of the honour of your late brother Peer, and see in me his widow and representative, recollecting how easy it may be for a next-of-kin to prosecute the widows or the daughters, not only of every Peer, but of every subject of Great Britain, if it can be affected by the oath of one superannuated and interested old woman, who declared seven years ago that she was incapable of giving evidence thereon, as will appear in proof before your Lordships. And I may further observe to your Lordships that my case is clearly within the proviso

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of the statute on which I am indicted. In the third clause it is “ provided that this Act shall not extend to any person, where the former marriage hath been, or hereafter shall be, declared by sentence of the Ecclesiastical Court to be void, and of no effect.”

If there is supposed to have been a former marriage, the same must have been a true marriage or a false one. If a true one, it cannot be declared void; and if a false one, or the semblance of one only, then only, and no otherwise, is it that it can be declared void. Therefore must this proviso have respect to pretended marriages only, and to none other, and such only it is that can be the objects of causes of jactitation, the sentence in which is a more effectual divorce and separation of the parties than many divorces which have been determined to fall within this proviso. The crime charged in the indictment was not a felony, or even a temporal offence, until the Act of James I. Till then it was only cognisable in the Ecclesiastical Court, and, though an indictment could lie for a slight blow, yet the common law did not allow of a criminal prosecution for polygamy until that period. So that if the case comes within the exception of the only statute upon that subject, it is no offence at all, and Dr. Sherlock, Bishop of London, has said in such cases the law of the land is the law of God.

I have observed that I have greatly suffered in fame and fortune by the reports of Mr. Hervey, and I beg leave to mention in what manner—Your prisoner was at that time possessed of a small estate in the county of Devon, where Sir George Chudleigh, her father’s eldest brother, had large possessions. The purchase of that estate was much solicited in that county, and, having frequent opportunities to dispose of it, it was ever made an insuperable objection by the intended purchaser that I could not make a clear title to the estate on account of Mr. Hervey’s claim to your prisoner as his wife.

And your prisoner being possessed of building lands for a great number of years, for the same reasons she never had the ground covered (valued at £1200 per annum). And as your prisoner’s health declined and made it necessary for her to seek relief in foreign climes (which increased her expenses beyond what her circumstances could support), and her little fortune daily decreased by money taken up on mortgage and bond, as will appear by the evidence of Mr. Drummond, her Royal mistress likewise in the decline of life, whose death would probably deprive her of £400 a year, the prosecutions threatened on Mr. Hervey’s side presented but a gloomy prospect for her declining life. Your prisoner was induced, as she before observed to your Lordships, to follow the advice of Dr. Collier, and instituted the suit of jactitation, your prisoner subscribing entirely to his opinion and following his advice and instructions which she presumes alone is a full defence against the charge of felony. For your Lordships in

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your great candour cannot think that a lady can know more of the civil law than her learned civilians could point out to her.

And as a criminal and felonious intent is necessary to constitute the offence with which I stand charged, certainly I cannot be guilty in following the advice I received, and in doing what in my conscience I thought an authorised and innocent act.

Though I am aware that any person can prosecute for the Crown for an offence against an Act of Parliament, yet I will venture to say that few instances, if any, have been carried into execution without the consent of the party injured; and with great deference to your Lordships' judgment I venture to declare that in the present case no person whatever has been injured, unless your Lordships' candour will permit me to say that I am injured, being now the object of the undeserved resentment of my enemies. It is plain to all the world that His Grace the Duke of Kingston did not think himself injured, when in that short space of five years His Grace made three wills, each succeeding one more favourable to your prisoner than the other, giving the most generous and incontestable proof of his affection and solicitude for my comfort and dignity. And it is more than probable, my Lords, from the well-known mutual friendship subsisting between us, that had I been interested I might have obtained the bulk of his fortune for my own family, but I respected his honour, I loved his virtues, and had rather have forfeited my life than have used undue influence to injure the family, and, though it has been industriously and cruelly circulated, with a view to prejudice me, that the first born of the late Duke's sister was deprived of the succession to His Grace's fortune by my influence, the wills, my Lords, made in three distant periods, each excluding him, demonstrate the calumny of these reports.

I must further observe to your Lordships, in opposition to the charge against me of interestedness, that had I possessed or exercised that undue influence with which I am charged by the prosecutor, I might have obtained more than a life-interest in the Duke's fortune; and though, from the affection I bear to the memory of my late much-honoured husband, I have forborne to mention the reason of his disinheriting his eldest nephew, yet Charles, the second son, with his heirs, appear immediately after me in succession, William and his heirs follow next, after him Edward and his heirs, and the unfortunate Thomas, Lady Frances's youngest son, is not excluded, though labouring under the infirmities of childhood at the age of manhood and not able to support himself. For the late noble Duke of Kingston repeatedly mentioned to your prisoner, "I have not excluded him, for he has never offended; and who can say God cannot restore him? Who can say that God will not restore him to health?" My Lords, that good man did honour to the Peerage, honour to his country, honour to human nature.

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His Grace the Most Noble Duke of Newcastle appeared with the will, which had been entrusted to His Grace for four years by his late dear friend. In honour to the lady, Frances Meadows, the prosecutor, was requested to attend at the opening of the will; he retired with displeasure, disappointed that his eldest son was disinherited, and unthankful, though the Duke's fortune still centred in his four youngest sons and their posterity.

Worn down by sorrow, and in a wretched state of health, I quitted England without a wish for that life which I was obliged by the laws of God and Nature to endeavour to preserve, for your prisoner can with great truth say that sorrow had bent her mind to a perfect resignation to the will of Providence. And, my Lords, while your unhappy prisoner was endeavouring to re-establish her greatly impaired health abroad, my prosecutor filed a bill in Chancery upon the most unjust and dishonourable motives. Your prisoner does not complain of his endeavouring to establish a right to himself, but she does complain of his forming a plea or dishonourable and unjust opinions of his late noble relation and generous benefactor, to the prejudice and discredit of his much-afflicted widow; and, not satisfied with this prosecution as a bulwark for his suit in Chancery, he cruelly instituted a criminal prosecution, in hopes, by a conviction in a criminal cause, to establish a civil claim, a proceeding discountenanced by the opinion of the late Lord Northington.

I have heretofore forbore, from the great love and affection to my late noble Lord, to mention what were the real motives that induced His Grace to disinherit his eldest nephew, and when my plea and answer in Chancery were to be argued I particularly requested of the counsel to abstain from any reflections upon my adversaries, which the nature of their prosecutions too much deserved, and grieved I am now that I must no longer conceal them. For as self-preservation is the first law of Nature, and as I am more and more persecuted in my fortune and my fame, and my enemies hand about pocket-evidence to injure me in every company, and with double tongues they sting me to the heart, I am reduced to the sad necessity of saying that the late Duke of Kingston was made acquainted with the fatal cruelty with which Mr. Evelyn Meadows treated an unfortunate lady, who was as amiable as she was virtuous and beautiful; to cover which offence he most ungratefully and falsely declared that he broke his engagements with her for fear of disobliging the Duke, which he has often been heard to say. This, with his cruelty to his sister and mother, and an attempt to quit actual service in the war, highly offended the Duke, and it would be difficult for him, or his father, to boast of the least friendly intercourse with His Grace for upwards of eighteen years.

In a dangerous state of health, when my life was despaired

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of, I received a letter from my solicitor, acquainting me that if I did not return to England to put in an answer to the bill in Chancery within twenty-one days I should have receivers put into my estates; and also that, if in contempt of the indictment I did not return, I should be outlawed. It clearly appeared to me, my Lords, as I make no doubt it does to your Lordships, that if in the inclemency of the weather I risked to pass the Alps my life would probably be endangered, and the family would immediately enter into possession of the real estates, and if female fears should prevail that I should be outlawed. Thus was I to be deprived of life and fortune under colour of the law; and that I might not return to these persecuting summonses, by some undue and cruel proceedings my credit was stopped by my banker for £4000, when there remained an open account of £75,000, and at that instant upwards of £6000 was in his hands, my revenues being constantly paid into his shop to my credit. Thus was I commanded to return home at the manifest risk of my life, and at the same time every art used to deprive me of the means of returning for my justification. Conscious of the perfect innocence of my intention, and convinced that the laws of this country could not be so inconsistent as to authorise an Act, and then defame and degrade me for having obeyed it, I left Italy at the hazard of my life. It was not for property I returned, but to prove myself an honourable woman. Grant me, my Lords, but your good opinion, and that I stand justified in the innocence of my intention, and you can deprive me of nothing that I value, even if you should take from me all my world possessions; for I have rested on that seat where the poor blind Belisarius is said to have asked charity of every passenger, after having conquered the Goths and Vandals, Africans and Persians, and would do the same without murmuring if you would pronounce me what I hope your Lordships will cheerfully subscribe to—that I am an honourable woman.

Your late brother, the truly honourable Duke of Kingston, whose life was adorned by every virtue and every grace, does not his most respectable character plead my cause and prove my innocence?

The evidence of the fact of a supposed clandestine marriage with Mr. Hervey depends entirely upon the testimony of Ann Cradock. I am persuaded your Lordships, from the manner in which she gave her evidence, already entertain great suspicions of the veracity of her testimony. She pretends to speak to a marriage ceremony being performed, at which she was not asked to be present, nor can she assign any reason for her being there. She relates a conduct in Mrs. Hanmer, who she pretends was present at the ceremony, inconsistent with a real marriage; she acknowledges that she was in or about London during the jactita-

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tion suit, and that Mr. Hervey applied to her on that occasion, and swears that she then and ever had a perfect remembrance of the marriage, and was ready to have proved it, had she been called upon, and never declared to any person that she had not a perfect memory of the marriage, and that she never was desired either to give or withhold her evidence; and from Mr. Hervey's not calling on this woman it is insinuated that he abstained from the proof by collusion with me. She also swears that I offered to make her an allowance of twenty guineas a year, provided she would reside in either of the three counties she has mentioned, but acknowledges she has received no allowance from me. Can your Lordships believe that if I could have been weak enough to have instituted the suit, with a conviction in my own mind of a real lawful marriage between Mr. Hervey and myself, that I would not, at any expense, have taken care to have put the woman out of the way? But, my Lords, I trust that your Lordships will be perfectly satisfied that great part of the evidence of this woman is made for the purpose of the prosecution; though she has denied she has any expectation from the event, or ever declared so, yet it will be proved to your Lordships that her future provision (as she has declared) depends upon it. And notwithstanding she has now brought herself up to swear that she heard the ceremony of marriage performed, yet it will be proved that she has declared she did not hear it, and it will be further proved to your Lordships that Mr. Hervey was extremely solicitous to have established a legal marriage with me for the purpose mentioned by Mr. Hawkins, and that this woman was actually applied to and declared to Mr. Hervey's solicitor that her memory was impaired, and that she had not any recollection of it, which was the reason why she was not called as a witness.

If she is thus contradicted in these particulars, and appears under the influence of expectations from this event of the prosecution, your Lordships will not credit her evidence that the complete ceremony of marriage was performed, or any other particulars which rest upon her evidence.

With respect to what your Lordships have heard from the witness of my desire at times to be considered as the wife of Mr. Hervey, your Lordships in your candour will naturally account for that circumstance after the unfortunate connection that had subsisted between us.

I call upon God Almighty, the Searcher of Hearts, to witness, that at the time of my marriage with the Duke of Kingston I had, myself, the most perfect conviction that it was lawful. That noble Duke to whom every passage of my life has been disclosed, and whose affection for me, as well as regard for my honour, would never have suffered him to have married me had he not as well as myself received the most solemn assurances from Dr. Collier that

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the sentence, which had been pronounced in the Ecclesiastical Court, was absolutely final and conclusive, and that I was perfectly at liberty to marry any other person. If, therefore, I have offended against the letter of the Act, I have so offended without criminal intention. Where such intention does not exist, your Lordships' justice and humanity will tell you there can be no crime; and your Lordships, looking on my distressed situation with an indulgent eye, will pity me as an unfortunate woman, deceived and misled by erroneous notions of law, of the propriety of which it was impossible for me to judge.

Before I take my leave, permit me to express my warm and grateful sense of the candour and indulgence of your Lordships, which have given me the firmest confidence that I shall not be deemed criminal by your Lordships for an act in which I had not the least suspicion that there was anything illegal or immoral.

I have lost, or mislaid, a paper where I had put together my ideas to present to your Lordships. The purport was to tell your Lordships that my advocate, Dr. Collier, who instituted this suit of jactitation, is now in a dangerous state of health; he has had two physicians to attend him, by my order, yesterday, to insist and order his attendance to acquaint your Lordships that I acted entirely under his directions; that it was by his advice I married His Grace the Duke of Kingston, assuring me that it was lawful; that he had the honour of going to His Grace the Duke of Canterbury to obtain a licence for the marriage. After mature consideration and consultation with great and honourable persons in the law, he returned the licence to Dr. Collier, with full permission for our marriage. Dr. Collier was present at the marriage; Dr. Collier signed the register of St. George's Church. Mr. La Roche has frequently attended the Duke of Kingston to Dr. Collier, where he heard him consult the doctor if the marriage would be lawful. He said it would, and never could be controverted.

Under these circumstances I wished to bring my advocate forth to protect me. He, my Lords, is willing to make an affidavit, to be examined by the enemy's counsel, to submit to anything that your Lordships can command, willing to justify his conduct. But he has had the misfortune, my Lords, ever since the latter end of August, or the first week in September, I do not well remember which, never to have been in bed. I apprehended from seeing him yesterday, with your Lordships' indulgence, that he had the St. Anthony's fire, but my physicians, who have been with him, can give a better account, if you will permit them, of the state of his health, that your Lordships may not imagine that he keeps back, or that I am afraid to produce him. If it is not to avail me in law, I ask no favour, but I petition your Lordships, and would, upon my knees, that you will hear the evidence

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that he will give to the justification of my honour, though it does not avail me in law.

I do request that Dr. Collier may be examined in the strictest manner, and by every enemy that I have in the world. My physicians saw him last night, and they can, previous to his examination, inform your Lordships in what state they apprehend him to be.

LORD RAVENSWORTH—After what I have just heard from the prisoner at the bar, it is impossible not to feel equally with the rest of your Lordships. And, my Lords, what came last from the prisoner at the bar I own strikes me with the necessity of permission being given, if it could be done, to have Dr. Collier examined.

LORD CAMDEN—I am really, my Lords, at some loss to know upon what ground it is your Lordships stand at this moment with respect to the evidence of Dr. Collier. I do not understand yet that Dr. Collier is called by the prisoner or by her counsel. I do not yet understand that, in consideration of the infirm state of his health, the prisoner or her counsel do require from your Lordships any specific particular mode of examination by which your Lordships might be apprised of the substance of his evidence. I understand neither of these things to be moved to your Lordships; if they were, matter of debate on either one or the other might probably arise, and then this is not the place for your Lordships to enter into a consideration of it. With regard to the case itself, which the noble prisoner has made for one of her most material witnesses, it is undoubtedly such as would touch your Lordships with a proper degree of compassion, as far as the justice of the Court can go, and your feelings are able to indulge. Beyond that it is impossible, let your Lordships' desire be what it may, for you to transgress the law of the land, or to go beyond the rules prescribed by those laws is impossible. A witness to affirm that he is totally incapable of attendance! Your Lordships, if you are to lose his evidence, will lament the want of it. Justice cannot be so perfect and complete without the examination of a necessary and material witness, as if you had it; but if a greater evil than that should happen (and it has frequently happened in the course of causes), which is death itself, which shuts up the mouth in everlasting silence, if this should arrest the witness before he could be produced, his evidence is lost for ever. If this witness should by his infirmity be totally unable to attend while this cause lasts, I am sorry to say your Lordships must go on without him; it is impossible to wait until that witness can be produced. While the cause lasts (and your Lordships will precipitate nothing in the course of justice), if he can be brought, you will make every accommodation to receive him, you will take every means in your power to make the attend-

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ance safe and convenient for him, you will receive him in any part of the cause, even at the last moment before it is concluded. So far your Lordships may go; beyond that I doubt you cannot. But, my Lords, I have now been speaking without a question, without a motion, without anything demanded of your Lordships by the prisoner or by her counsel.

LORD RAVENSWORTH—I would beg leave to put it to those noble Lords who sit upon the bench, whether there ever was any instance in a criminal cause of a witness being examined otherwise than in an open Court.

LORD CAMDEN—The noble lord is pleased to put a question particularly pointed to such of your Lordships as have been educated in the profession of the law to know “whether any instance can be produced where a witness not attending at your bar, to be examined *viva voce*, has been permitted by commission, by delegation, or any other manner whatever, to give his evidence out of Court, so that evidence so given out of Court might be reported into the Court, and stand as evidence on the trial.” I presume that is the point in which the noble Lord desires to know if any precedent can be produced. When that question is asked, and the answer is to be a negative, your Lordships easily conceive how much the modesty of the answerer is to be affected, if he gives a full, a positive, and a round negative to that question. I therefore beg to be understood as confining the answer to my own knowledge. Within the course of my own practice and experience I never did know of such an instance; I never heard of such an instance; I speak in the presence of those who are better versed in this kind of knowledge than myself; I speak before the law of the land, which is now upon your Lordships’ Woolsacks. My Lords, if any such case occurs to them, it will be easy for your Lordships to apply to them; I know of no such, and if I might briefly add one word on the subject, I hope I shall never see such an instance so long as I live in this world. What, my Lords! to give up, and to part with, that noble privilege in the mode of open trial, of examinations of witnesses *viva voce* at your bar, with a cross-examination to confront them in the eye of the world, and to transfer that to a private chamber on a few written interrogatories! I go too far in arguing the point. I never knew an instance. I am in the judgment of the House, and of the learned Judges that hear me. If there ever was an instance let it be produced, and in God’s name let justice be done.

Mr. BERKLEY—My Lords, what knowledge I had of this business arose from my being attorney to Lord Bristol, and I must leave it to your Lordships whether I ought to be examined as being attorney for Lord Bristol, confident with honour to myself and the duty I owe to him.

Mr. WALLACE—I know the delicacy of the situation of an

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attorney. I merely call Mr. Berkley to what passed between him and Mrs. Cradock, being sent to get her to attend and prove the marriage.

LORD MANSFIELD—With regard to the demurrer put in by Mr. Berkley to the question that is asked him, when they make him a witness they subject him to cross-examinations, but the point is whether he, as being concerned as solicitor for my Lord Bristol, can demur to the question put to him to know what this woman said when he went to desire her to come to give evidence, and as to that there seems to be no colour to the demurrer; for the protection of attorneys is as to what is revealed to them by their client, in order to take their advice or instruction with regard to their defence. This is no secret of the client, but is to a collateral fact, what a party said to him upon such an application; and it has been often determined that as to fact an attorney or counsel has no privilege to withhold his evidence if there is a doubt. Even if he swears to an answer in Chancery, he cannot protect himself from swearing, whether that is his client's hand or not, or to his having sworn it, or the execution of a deed; it does not come within the objection to an attorney revealing the secrets of his client. I suppose it is only mentioned to your Lordships for a justification. If none of your Lordships are of a different opinion, it will save time, and the witness will understand it to be the opinion of all your Lordships.

Examined by Mr. WALLACE—I beg to know whether you ever made any application to Mrs. Cradock relative to her being a witness to the marriage?—I did.

At what time?—It was after my Lord Bristol was served with a citation to Doctors' Commons.

For what purpose did you apply to her?—To know what she knew relative to the marriage between Lord Bristol and Miss Chudleigh.

What answer did Mrs. Cradock give to that?—My Lord Bristol was present. She said she was very old, very infirm, and the transaction happened many years ago, and she could not at that distance of time remember anything of the matter, upon which my Lord Bristol seemed vastly surprised, and said, "How can you say so?" or to that effect.

Did she persist in not remembering anything of the transaction?—She did, and said she remembered nothing of the matter, and that was the only time I ever saw her.

Cross-examined by the ATTORNEY-GENERAL—Were you sent to her as a person that was present at the marriage?—I was employed in order to collect evidence from different people, whom my Lord Bristol directed me to go to, and other people, with respect to

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the marriage, as his Lordship wanted to have a divorce, and in that way I saw Mrs. Cradock.

Did Lord Bristol explain his want of a divorce at the time he sent you to the witness?—The direction I had from my Lord was in May, 1768.

Was it at that time my Lord Bristol told you he wanted a divorce?—It was.

What you have said was after the citation?—When I saw the witness, as well as I remember, it was after the citation.

Did Lord Bristol describe the witness to you as present at the marriage?—He did. My Lord said that she could prove the marriage.

When Lord Bristol expressed himself surprised at that disappointment, did he then express to you that she was one of those present at the marriage?—I do not know that my Lord did.

Was she never represented to you as a person present at the marriage?—I understood, as she was represented to me, that she was present at the marriage.

Was her husband, Mr. Cradock, ever represented as being present at that marriage?—Mr. Cradock has often told me that he was not.

The question that I mean to put upon that is, why was the husband called who was not present at the marriage, and the wife not called who was represented to be present at the marriage?—I know nothing of that; it went out of my hands afterwards to Doctors' Commons.

Did you decline that part of the business in respect to Doctors' Commons?—I apprehend I could not act there.

Are you an attorney or a proctor?—An attorney, not a proctor.

Mrs. ANN PRITCHARD, examined by Mr. MANSFIELD—Do you know Mrs. Cradock?—Yes.

Have you ever had any conversation with Mrs. Cradock concerning the reading the marriage ceremony between the lady at the bar and Lord Bristol?—No, I never had.

Did you ever hear Mrs. Cradock say anything concerning that ceremony, or her having heard it, or not heard it?—Never, before she was examined.

What do you mean, before she was examined?—Before a Master in Chancery.

When was that?—I cannot particularly say the time; it was about a month after I was examined, to the best of my knowledge.

When were you examined?—I cannot particularly say the time when she was examined.

Can you recollect how many months ago?—I cannot, indeed; it might be a year and a half ago.

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What did Mrs. Cradock say to you in that conversation, which she had with you, about her having heard, or not having heard, the marriage ceremony?—She related her examination before the Master in Chancery concerning Her Grace's marriage.

In that conversation did Mrs. Cradock say whether she had, or had not, heard the marriage ceremony read?—I never heard her relate anything concerning the marriage ceremony. I understand the question now; I did not before. She told me she did not hear the marriage ceremony.

Had you any conversation with Mrs. Cradock about any advantage which she expected from this prosecution?—I had.

What did Mrs. Cradock say to you in that conversation?—She told me she was to be provided for, but in what manner she could not say till after the affair was over, lest it should be deemed bribery.

Did you hear anything more said by Mrs. Cradock relating to that subject?—Not at that time, but at another time I have.

What did you hear from her at the other time?—I gave her an invitation to come and see me. She told me it would not suit her until this affair was over, and then if she could get a good fortune she might come and live with me.

Did you hear from Mrs. Cradock anything said of any particular provision to be made for her, or any place to be got?—Her brother applied to my husband at the Custom House, desiring him in case he heard of a vacancy to let him know.

The ATTORNEY-GENERAL—This is not evidence in the question now proposed. I know nothing of what will be brought; but this is not evidence.

Mr. MANSFIELD—Nothing that passes, unless it comes home to Mrs. Cradock, will be evidence, to be sure. The witness must relate it in her own manner.

The ATTORNEY-GENERAL—I object to the witness relating either in her own, or in any other manner whatever, a conversation to which Mrs. Cradock is not a party.

Mr. MANSFIELD—It is under an apprehension that it will come to Mrs. Cradock, or it would not be asked. (*To Witness*)—Did you tell to Mrs. Cradock what you heard from her husband?—I told her myself that her brother had been at the Custom House to desire my husband when there was a vacancy in the House, to let him know of it, as Mr. Medows had promised to get him a place.

What did Mrs. Cradock say to you upon your telling her this?—She had never heard anything about it.

Did Mrs. Cradock say anything more to you about this place?—Her answer was, it was more than she knew, but that it would be equally the same.

What was meant by being equally the same?—She thought her

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brother was to provide for her out of it, or at least allow her something.

Cross-examined by the ATTORNEY-GENERAL—How long have you been acquainted with Mrs. Cradock?—Five years.

How long with the prisoner?—From the 2nd of February last.

I wish to know whether anybody was present at any of the conversations which you had with Mrs. Cradock but yourself?—No.

I wish you would tell where they were?—Once at my own house at Mile-End.

At what time was that conversation held at your house at Mile-End?—It was on a Sunday, but I cannot particularly tell the month.

How long ago was that Sunday?—It was a very little time after she had been subpœnaed.

Do you know if it was a week, or more time, or less, after she had been subpœnaed?—It might be more than a week. I cannot tell particularly.

What reason have you to know that it was within some short time after she had been subpœnaed?—As we were very intimate acquaintances, she came to dine with me. She told me she longed to tell me what had happened since the last time she saw me.

But how long was that last time she saw you before that last time that she came to you again?—I cannot particularly say.

As near as you can go, was it a fortnight?—It might be a quarter of a year.

Have you any means of recollecting within a week or a fortnight of the time of her having been examined upon the subpœna?—I cannot possibly recollect, as not expecting ever to be called upon.

Does your intimacy continue with Mrs. Cradock?—It always did, until she had been confined at Mr. Beauwater's.

Did you ever mention this conversation to Mrs. Cradock since that time it happened?—No, never.

Will you give an account to their Lordships of the whole conversation which Mrs. Cradock held upon the subject of that marriage; whether she told you the whole story of the marriage?—She told me a great deal of it. I do not know the particulars.

It is important that you should recollect as many particulars as you can that Mrs. Cradock told you of that marriage. What particulars did Mrs. Cradock tell you of that marriage?—She told me that she had been examined by a Master in Chancery, who asked her if she knew of the marriage between Augustus John Hervey and Miss Chudleigh. They asked her if she was in the church, and she told them herself, Mr. Merrill, and Mrs. Hanmer. They asked her if she heard the ceremony. She told them she did not. That was all the particulars I heard her relate.

Had not you the curiosity yourself to inquire after some more particulars?—I had not.

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Did she ever tell you at what time of night it was?—Never.

Was anybody present at the conversation about the reward that the witness expected?—No.

At what time was that conversation had?—It was after dinner, it might be at two o'clock on the Sunday; it was summer-time I know, but I cannot particularly say the month.

Was it the same Sunday that the former conversation passed?—No.

Whether, when the witness proposed, on her having a great fortune coming to her, that she should live with Mrs. Cradock, or Mrs. Cradock live with her?—Mrs. Cradock live with me!

What are you?—In a very creditable situation, and a pretty fortune. I live at Mile-End.

Do you carry on any business at Mile-End?—No.

Are you married?—Yes.

Has your husband any business?—Yes; a place in the Custom House.

By LORD GROSVENOR—What do you mean by Mrs. Cradock's being confined at Mr. Beauwater's?—I went to inquire for her; I was not permitted to see her.

By LORD DENBIGH—Did you see the prisoner herself at that time?—I did.

What passed between you and the prisoner?—I cannot particularly relate it; nothing material.

Did nothing pass relative to this trial?—Nothing.

Did nothing pass relative to the conversations between you and Mrs. Cradock?—I do not recollect there was.

LORD WEYMOUTH—I think the witness has said that Mrs. Cradock told her that she did not hear the ceremony read; and Mr. Cradock has likewise told your Lordships that she was present when the ceremony was read. I should be glad to ask whether Mrs. Cradock gave any reason for not having heard the ceremony, whether that she was at a distance in the church, or the clergyman did not speak loud enough.

The WITNESS—She was at too great a distance in the church.

By the DUKE OF RICHMOND—Did Mrs. Cradock tell you that she had in her examination before the Master in Chancery said that she did not hear the ceremony read?—She told me she did.

Dr. WARREN, examined by Mr. WALLACE—Have you lately seen Dr. Collier?—I visited Dr. Collier yesterday, about eight o'clock in the afternoon, and found him very ill under a variety of complaints, particularly a St. Anthony's fire in his head and face, by which one side of it was so much swelled that the eye was almost closed up. It appeared to me that he could not venture out without great hazard.

Cross-examined by the ATTORNEY-GENERAL—Do you think Dr.

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Dr Warren

Collier's condition such that he could not stir out without danger?—I said so.

What sort of danger do you mean, when you speak of the danger under which he would come out?—I think that he is in danger; I cannot say that it would certainly kill him, but it would be very imprudent in me to advise him to come out.

Mr. LAROCHE, examined by Mr. MANSFIELD—Did you know the late Duke of Kingston, and did you know Dr. Collier?—Yes, I knew both His Grace the Duke of Kingston and Dr. Collier.

Were you present at the marriage of the lady at the bar and the Duke of Kingston?—I was.

Was Dr. Collier present also at the marriage?—He was.

Do you know that Dr. Collier was consulted by the lady at the bar and the Duke of Kingston, while the suit was depending in the spiritual Court?—I do know that I have frequently walked with His Grace the Duke of Kingston to Doctors' Commons in a morning to Dr. Collier. I have gone also with the Duchess in her coach, and the Duke likewise, to Dr. Collier.

Has this happened frequently?—Many times.

Were you ever present with Dr. Collier and the Duke of Kingston and the lady at the bar after that sentence had been given in that Court?—I was several times at Dr. Collier's chambers after the suit had been determined.

Were you present when Dr. Collier gave to the lady at the bar, or the late Duke of Kingston, or both of them, any opinion concerning the effect of that sentence?—I was many times at Dr. Collier's chambers, and in conversation I have heard Dr. Collier tell the Duke that he might with safety marry the Duchess of Kingston, Miss Chudleigh, as she then was.

Have you heard that opinion, or to that effect, given more than once?—I cannot be exact; I have heard it said from Dr. Collier to the Duke.

Have you heard that said also in the presence of the lady at the bar by Dr. Collier?—I think I have, to the best of my recollection. I went with the Duke of Kingston, I breakfasted with him, as well as I can recollect, the morning that he was married. We then agreed to dine together at the Thatched House Tavern. I went into the city with His Grace first of all to Dr. Collier's to get the licence. Dr. Collier, when we came there, was not at home, but was gone to His Grace's house with the licence in his pocket.

Cross-examined by Mr. DUNNING—My Lords, I should be glad to ask Mr. Laroche what the occasion was of taking these opinions of Dr. Collier, whether it arose about any doubt entertained by the Duke or the lady, or both, whether they were at liberty to marry?—The Duke certainly had a doubt upon his breast, until

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Mr Laroche

the suit of jactitation was over. In consequence of that sentence, at the decree of which I was present, and which declared her a single woman, he applied to Dr. Collier to know whether there was anything further to go on that might impede his marriage. He was told no, that she was a single woman, and he might marry her.

Were these conversations pending the suit, or after the suit was determined?—The last conversation was after the suit was over. During the time of the suit I have frequently, I suppose, when I was in town, walked five days out of six into the city with the Duke, and then we called there to know how the suit went on.

Do you recollect how long the suit had been determined before the marriage with the Duke of Kingston?—I should think, to the best of my recollection—I believe within three weeks. There were fourteen days to put in an appeal. The appeal was revoked, and I believe they married the week after.

Did the Duke's doubt continue until the day of the marriage?—He had no doubt after he had applied for the licence, and the licence had been granted.

What was the occasion of the conversation that passed upon the morning of the marriage between the Duke and Dr. Collier?—There was no conversation upon it as I remember between them upon the morning of the marriage.

When did Dr. Collier inform the Duke that he might marry?—It was, I believe, after the revocation of the appeal; but it was after the sentence was obtained.

Will you be so good as to fix the time as nearly as you can when both these conversations passed between Dr. Collier and the Duchess?—As for ascertaining a time I cannot, but it was from the meeting of the Parliament in the month of October, 1768. If I remember right, it was the beginning of the Sessions of Parliament before last, and during that time I used often to walk with the Duke to Dr. Collier's.

How many days was it before the marriage, if I am mistaken in supposing you said the day of the marriage?—It might be three or four days, or within a week.

Do you know that Dr. Collier had been in fact informed that there had been a marriage between the lady and Mr. Hervey?—I know nothing at all of that.

Were you yourself informed at this time that there had been in fact a marriage between the lady and Mr. Hervey?—I never knew that there had been a marriage.

Had you been so informed, was my question?—From hearsay and nothing else; I heard there was a suspicion of a marriage, and that she had put him upon the proof of that marriage, and that he had failed in his proof.

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Mr Laroche

Had you, or had you not, been informed of the marriage by the lady herself?—Never.

Can you enable their Lordships to judge what was the occasion that drew the Duke and Duchess to make this application to Dr. Collier so recently before the marriage and so long after the sentence?—I suppose the meaning of the Duke's going there was to ask Dr. Collier, who had the whole management of the affair, whether he could with safety marry the Duchess.

Do you know whether anybody had or had not suggested a doubt upon the subject?—There had been a doubt before the sentence, but after the sentence there was no doubt; but still he thought proper to ask him, because there was an appeal. That appeal was revoked, and after that appeal he married.

Mr. MANSFIELD—If your Lordships will permit me I will ask one question of Mr. Laroche. Whether, in the opinion that Dr. Collier gave to the Duke of Kingston in his hearing, Dr. Collier founded his opinion upon the effect of that sentence which had passed.

The WITNESS—He certainly did, in my conception of the matter.

Mr. DUNNING—I should be glad to know whether the witness meant to have it understood upon what Dr. Collier founded his opinion that such a marriage, if it had been lawful, could be set aside by those proceedings?

The WITNESS—The words I heard were these: “You may safely marry Miss Chudleigh, my Lord, for you neither offend against the laws of God nor man.”

By LORD FAUCONBRIDGE—After this had they any doubt that they might lawfully marry?—After the sentence pronounced in the Ecclesiastical Court, I am firmly of opinion that neither of them had a doubt as to the legality of the marriage.

Mr. WALLACE—My Lords, I have many witnesses to prove facts, which I believe will be admitted by the gentlemen on the other side, because they have already been proved in another place. They are such as the lady at the bar living continually in the state of a single woman, and transacting in that character matters of consequence relative to property. They are already contained in depositions in another place, and I shall offer to your Lordships now that sentence which has been pronounced in Doctors' Commons; the officer swears he brought it from Doctors' Commons. Your Lordships are in possession of it.

The ATTORNEY-GENERAL—I have already stated to your Lordships the measure which was observed in giving evidence in that case in Doctors' Commons, both upon one side and the other; and I stated the measure observed upon the part of the prisoner in Doctors' Commons to be that of her having given evidence that she acted as a single woman in a great many transactions.

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Mr. WALLACE—Then, my Lords, I call no more witnesses.

LORD HIGH STEWARD—Mr. Solicitor-General, you will please to reply.

The SOLICITOR-GENERAL—My Lords, the custom which has prevailed in trials at your Lordships' bar authorises the counsel on the part of the prosecution to observe upon the evidence that has been laid before your Lordships, and to apply that evidence to the charge. In the present case, wishing to discharge my duty as counsel in a public prosecution without the least degree of unnecessary severity, or occasioning a momentary reflection of pain to the adverse party who stands at your Lordships' bar, reflecting on the whole course of the evidence that has been given, being in my own mind so clearly convinced as I am that the evidence offered in support of the prosecution has not in the least degree been answered by any evidence that has been offered in defence, but, on the contrary, that the nature of the defence attempted supports, confirms, and gives credit to the charge, I find nothing on which I could with propriety observe in this period of the business at your Lordships' bar but the speech which has been made by the prisoner in defence. And I trust your Lordships will think that it is in no degree abandoning the duty I owe unto the credit and weight of a public prosecution if I decline entering into observations in reply to a mere argumentative defence offered to your Lordships by a prisoner in person. I therefore hope that your Lordships will think that I have not failed in my duty in declining to trouble your Lordships any further upon this matter.

[The Solicitor-General having finished his replication on the part of the prosecution, the Duchess of Kingston was ordered from the bar.

The House was then adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the customary order, and after some time the House was adjourned again into Westminster Hall.

The Peers being seated, the Lord High Steward in his chair, and the House resumed, the Serjeant-at-Arms made proclamation for silence as usual.]

LORD HIGH STEWARD—Your Lordships have heard the evidence, and everything that has been alleged on both sides; and you have also heard the opinion of the learned and reverend judges upon the questions stated to them; and the solemnity of your proceedings requires that your Lordships' opinions on the question of guilty or not guilty should be delivered severally in the absence of the prisoner, beginning with the junior Baron; and that the prisoner should afterwards be acquainted with the

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Lord High Steward

result of those opinions by me. Is it your Lordships' pleasure to proceed now to give your opinions upon the question of guilty or not guilty?

LORDS—Ay, ay.

Then the LORD HIGH STEWARD stood up uncovered, and beginning with the youngest Peer said—

John Lord Sundridge (Duke of Argyle in Scotland), what says your Lordship? Is the prisoner guilty of the felony whereof she stands indicted or not guilty?

Whereupon John Lord Sundridge, standing up in his place uncovered, and laying his right hand upon his breast, answered, "Guilty, upon my honour."

In like manner one hundred and sixteen Lords answered, "Guilty, upon my honour," while one, the Duke of Newcastle, answered, "Guilty erroneously, but not intentionally."

LORD HIGH STEWARD—My Lords, I am of opinion that the prisoner is guilty, upon my honour. My Lords, as your Lordships have found the prisoner guilty of the felony whereof she stands indicted, one Lord only excepted, who said that she was guilty—"erroneously, but not intentionally." Is it your Lordships' pleasure that she should be called in and acquainted therewith?

LORDS—Ay, ay.

[Proclamation was then made for the Deputy Usher of the Black Rod to bring Her Grace the Duchess of Kingston to the bar, which was done. Afterwards proclamation was made for silence, as usual.]

LORD HIGH STEWARD—Madam, the Lords have considered the charge and evidence brought against you, and have likewise considered of everything which you have alleged in your defence; and, upon the whole matter, their Lordships have found you guilty of the felony whereof you stand indicted. What have you to allege against judgment being pronounced against you?

[The Duchess of Kingston delivered a paper, wherein Her Grace prayed the benefit of the Peerage according to the statutes.

Then His Grace the Lord High Stewart asked the counsel for the prosecution whether they had any objection to the Duchess's claim of the benefit of the Peerage.]

The ATTORNEY-GENERAL—My Lords, not expecting to be called upon, I did not attend to the form of words used by the prisoner. However, I understand that she claims the benefit of the statutes, not confining herself, I suppose, in the form of her claim, to one statute, but, alleging herself to be a Peeress, claims the benefit of both, meaning to insist that the Act, which exempts women from judgment of death, is to be construed with reference to that, which allows clergy to Lords of Parliament.

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Upon this claim I suppose two questions will naturally arise: one, whether it be competent in her situation to claim that judgment, or an analogous judgment, to that which would have been pronounced upon a Lord of Parliament convicted of the like offence; the other, what would be the extent, or possible extent, of that judgment upon a Lord of Parliament so convicted?

I speak to both these questions, because I conceive that, without aggravating the offence, I may fairly assume that all the qualifications which were put upon it have been fully and effectually proved: the marriage, the issue of that marriage, the fraud upon public justice, the additional aggravation that it was no less a surprise upon the Duke of Kingston than a scandal to the rest of the world.

This being the true state of the case, it must occur to every noble Lord's mind that the laws of this country would be considerably disgraced if it were possible to state to such a Court such a crime, attended with all its circumstances and qualifications, as an object of perfect impunity.

In this point of view I shall take it for certain that if I can establish in the judgment of your Lordships my own firm persuasion that this claim to avoid judgment of death cannot be made under the statute of Edward VI., or with any reference to it, but must resort to the Act of William and Mary, I shall then have laid upon your Lordships that opportunity, which justice, undoubtedly, will be desirous to lay hold on, of pronouncing a judgment somewhat more adequate to the offence, though perhaps in the opinion of many far enough from adequate. Or if, contrary to my present thoughts, she may claim any benefit from the first statute, yet the Act of Elizabeth will enable your Lordships to make some slight satisfaction to the law for so enormous a violation of it.

This I take to be a clear proposition, that from the beginning of time to this hour clergy was never demandable by women. By the ancient law of the land this privilege was so favourably used that reading was sufficient proof of clergy, and all were taken to be clerks who lay under no indispensable impediment to receive orders. This rule is laid down in all the books. Several statutes, nay, the provincial constitution of 1531, adopt the distinction thus made between persons in Holy orders and other clerks or lay clerks. But women were under this indispensable impediment. They might be professed and become religious, but even a nun could not claim this privilege. This is proved by the same books. And Lord Hale puts the case of manslaughter, where the husband shall have his clergy, and the wife no privilege. The statutes which exempt women from judgment of death expressly recite that they were not entitled to clergy, and distinctly provide a new and different species of exemption.

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Having reminded your Lordships of this clear rule in the law, I shall take up the statutes which are material to this argument in their order of time. This will lead me to consider: First, what is the true nature and extent of that exemption from capital punishment which his clergy gives to a Lord of Parliament by 1 Edward VI. and 18 Elizabeth; secondly, whether 21 James or 3 & 4 William and Mary contain any reference to those other laws.

In order to explain the true effect of the statute of Edward VI., I shall consider the situation in which the Peerage stood with respect to clergy at the time of making it. I say the situation of the Peerage as to clergy, because it will not be doubted, I suppose, that they were entitled to this valuable privilege in common with others. So peculiar and cruel a distinction could not have remained in perfect silence for such a number of years. Nor, if they had been entitled to claim it upon peculiar terms, would those have been unnoticed. Besides, if there be no evidence of such a privilege at any time, how can it be claimed now?

Although the allowance of clergy was setting aside the conviction as to the person of the offender, his goods remained forfeit, and the King seized his lands under the record. By 4 Henry VII. c. 13, it was to be allowed but once, and the convict was to be branded in open Court before the Judge. And in the very year of the statute now under consideration a long list of offences was deprived of it, and, even where it remained, slavery, with an iron yoke, was inflicted on the convict, as a vagabond.

It was thought too much to leave the Lords of Parliament exposed to those cruel and shameful stigmata, especially in cases where they might make purgation, and so be restored to the exercise of their high functions. Nay, in such instances even forfeiture was thought too much. It was also conceived by their Lordships that in their case capital punishment had extended too far. It was also thought proper to deliver a Lord of Parliament from the necessity of proving his title to clergy in the ordinary way. Therefore, by 1 Edward VI. c. 12, f. 14, it was enacted, "That in all and every case and cases, where any of the King's Majesty's subjects shall and may, upon his prayer, have the privilege of clergy, as a clerk convict, that may make purgation; in all those cases and every of them, and also in all and every case and cases of felony, wherein the privilege and benefit of clergy is restrained, excepted, or taken away by this statute or Act (wilful murder and poisoning of malice prepensed only excepted) the Lord and Lords of the Parliament, and Peer and Peers of the realm, having place and voice in Parliament, shall, by virtue of this present Act, of common grace, upon his or their request or prayer, alleging that he is a Lord or Peer of this realm, and claiming the benefit of this Act, though he cannot read, without

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any burning in the hand, loss of inheritance, or corruption of his blood, be adjudged, deemed, taken, and used, for the first time only, to all intents, constructions, and purposes, as a clerk convict, and shall be in case of a clerk convict, which may make purgation, without any further or other benefit of privilege of clergy to any such Lord or Peer from thenceforth at any time after for any cause to be allowed, adjudged, or admitted; any law, statute, usage, custom, or any other thing to the contrary in anywise notwithstanding." More shortly thus—At present men prove their clergy by reading, and must forfeit and be branded before it may be obtained. For the future, in all cases, where any of the King's subjects may now obtain privilege, as a clerk convict, who may make purgation, a Lord of Parliament, without reading, burning, or forfeiture, shall be adjudged, and used as, a clerk convict, who may make purgation. All that was harsh in the law was taken off the Peerage. All that was left was privilege. The trial by the Bishop and his clerks (which differed from trial by Peers, no more in the case of a Lord than of a commoner) was not substituted in the place of a legal trial, but superadded to it for his advantage. This was the only way which had then been thought of in any case to avoid judgment of death. The reason of the thing and the express letter of the statute unite to prove that till 18 Elizabeth, a Lord of Parliament, convicted of a clergyable crime, and being capable of purgation, must have been deemed and treated as a clerk convict, who might make purgation, and delivered over to the Ordinary for that purpose.

The learned and laborious Staunford, our ablest writer, at least on this branch of the law, treats it as a thing without question (Fol. 130). A Lord shall have privilege of clergy, where a common person shall not have it. He ought to make purgation, and, if so, he must be delivered to the Ordinary to be kept till he has made his purgation. If he confesses, abjures, or is outlawed, he cannot have the benefit of this statute, because he cannot make purgation. Staunford flourished when this statute was made, wrote a few years after, and died before 18 Elizabeth. His, therefore, is a contemporary exposition of it, unentangled with the casual phrase of any subsequent Act.

Hale, in his second volume (Fol. 376), where he seems to differ from Staunford as to the extent of the statute, agrees with him as to the nature of the privilege, which he calls the clergy of noblemen. At one time Judges would not deliver clerks to the Ordinary who had become incapable of purgation by confession or otherwise. The Church alleged that nothing done before an unlawful Judge was sufficient to sustain their process or sentence. Whereupon the *articuli cleri* provided that all clerks shall be delivered to their Ordinaries. But they were delivered, in the instances mentioned by Staunford, *absque purgatione facienda*.

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Now the case put in the statute is, where any man may have the privilege of clergy, as a clerk convict, that may make purgation. And a Lord of Parliament, being in the same predicament, was put in the case of a clerk convict that may make purgation, without reading or undergoing the pains which attended a commoner under those circumstances. Staunford, therefore, thought that these exceptions did not reach to the case, where, before the statute, there could be no purgation for any man. And the opinion was so probable that at least a very eminent lawyer, of unexceptionable character, in the time of the great Rebellion, actually burned a Peer who confessed. Hale doubts, especially at this day, when delivery to the Ordinary and purgation are both taken away by 18 Elizabeth. It is not obvious what difference that makes. I think, says he, it was never meant that a Peer of the realm should be put to read, or be burned, where a common person should be put to his clergy. Both agree that the Peer should have had his clergy, and have been delivered to the Ordinary, and have made purgation—exempt from the concomitant penalties; in some cases, says Staunford; in all, says Hale. But even Hale makes no doubt of Peers being liable to imprisonment.

In the trial of Lord Warwick the Chief Justice lays it down that the statute of Edward VI. exempted Peers from the penalty of burning, and repealed the statute of Henry VII. as to so much. Then a Peer was liable to burning before; and by the Act of Henry VII., which, in terms, puts it upon persons admitted to their clergy. But how could it be seriously argued that a thing so anxiously repealed never existed? I have consulted on this occasion as many books as I could think of referring to, and I don't recollect one which supposes a time when a Peer had not the benefit of his clergy.

Nothing, it must be confessed, could be more unprincipled and incongruous than to suffer the truth or justice of a conviction at common law to be questioned in the Ecclesiastical Court. But the Church had not then lost its hold upon men's minds, nor would probably, for some ages, but for its own glaring misconduct.

The trial, called purgation, as it was had in the Bishops' Court, was a ridiculous mockery of justice, or became serious only by the perjury, which it produced. It was therefore abolished. But simply to abolish it would also have cut off that imprisonment, which followed a conviction in the Bishops' Court, and which (it should have been presumed) would always follow actual guilt. To remedy which it was thought fit to give the Court authority to punish by imprisonment for any time less than a year. This was proper in all cases, but particularly so on the cases of Peers, and persons in Holy orders, who were not liable to burning in the hand. It was therefore enacted by 18 Elizabeth, c. 7, f. 2 and 3, "That every person and persons, which at any time,

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after this present Session of Parliament, shall be admitted and allowed to have the benefit or privilege of his or their clergy shall not thereupon be delivered to the Ordinary, as hath been accustomed; but, after such clergy allowed, and burning in the hand according to the statute in that behalf provided, shall forthwith be enlarged, and delivered out of prison, by the Justices, before whom such clergy shall be granted, that cause notwithstanding.

“ Provided, nevertheless, and be it also enacted, that the Justices before whom such allowance of clergy shall be had shall and may, for the further correction of such persons, to whom such clergy shall be allowed, detain and keep them in prison for such convenient time as the same Justices in their discretion shall think convenient, so as the same do not exceed one year’s imprisonment, any law or usage, heretofore had or used, to the contrary notwithstanding.”

The effect of these words “shall forthwith be enlarged and delivered out of prison, that cause notwithstanding,” is to give the person so enlarged exactly the same state and condition which he would have obtained under the former dispensation of law, by going through the process of purgation, and so being delivered from the offence. This part of the Act carries a great effect upon the construction of the whole. In conversation I have heard the words, “after burning in the hand,” supposed to be the phrase, upon which some doubt might turn whether Peers are included in the Act. But, in the construction of such a statute, it is not enough to find a phrase upon which some doubt might turn. It would be fitter for those who conceive the doubt to proceed at least one step further and state to what extent their doubt goes. Is it doubted whether purgation be taken away in the case of a Peer, and the Peer be restored to his law without it? Will any gentleman argue that, at this day, a Peer convicted of a clergyable crime shall not be forthwith enlarged, but must be delivered to the Ordinary to make his purgation? This point, I believe, never has, nor ever will, be argued. If he is not to undergo purgation, *quo jure* is he exempt? Does any other statute exempt a Peer from his purgation, or discharge him from his attainder, but this general statute of 18 Elizabeth, which in its large phrase comprehends everybody? I protest I know of none. Or does this statute exempt any but those who shall be thereafter admitted to clergy? The words, “after burning in the hand,” do not make an essential or necessary article in the description of the persons to be discharged, nor create any term or condition upon which the discharge is to obtain. The description of the persons to be discharged is absolved in these words, “all persons who shall be allowed the benefit of their clergy.” They are to be discharged absolutely. But when, and in what manner? why, after the allowance of clergy, and burning in the hand according

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to the statute, which is to say, in the cases provided by the statute, of which the case of a Peer is not one.

The whole consequence is no more than this, that in a case circumstanced like the present, where the honour of the law and the purity of manners require some example to be made, your Lordships may follow the bent of your discretion by resorting to the last clause in 18 Elizabeth. This I say, upon a supposition, that some Peer stood convicted of the like offence, with similar aggravation, or that, upon the rest of the argument, it will be possible to give any woman the benefit of any statute, *pari ratione*, as Peers have the benefit of clergy under 1 Edward VI. But I hope to prove soon that it is impossible to construe the subsequent statute in that manner. Consequently there will be due to this crime a very different sort of punishment than that which I have alluded to.

It will hardly be said that these statutes relate to women of any condition. The expression excludes them distinctly enough. If that had been more general, the subject-matter excludes them absolutely. They are no more clerks than Lords of Parliament. They never underwent purgation, nor were delivered to the Ordinary; they were therefore incapable of receiving these privileges, for these Acts were merely to regulate an old right, not to give a new one. Both the statutes, which give them their exemption, recite it as a general proposition that women were not entitled to clergy. Nor have I ever seen any statute, case, or book wherein any condition of women is supposed exempt but by virtue of the laws I shall state presently. It remains, then, to be considered whether the exemption provided by those laws has any reference to the statute of Edward VI.

The first statute, which exempts women from capital punishment in any case of felony, is 21 James I. c. 6, which runs thus: "Whereas by the laws of this realm, the benefit of clergy is not allowed to women convicted of felony, by reason whereof many women do suffer death for small causes, be it enacted by the authority of this present Parliament that any woman, being lawfully convicted by her confession, or by the verdict of twelve men, of or for the felonious taking of any money, goods, or chattels above the value of twelve pence, and under the value of ten shillings; or as accessory to any such offence, the said offence being no burglary, nor robbery in or near the highway, nor the felonious taking of any money, goods, or chattels from the person of any man or woman privily, without his or their knowledge, but only such an offence as in the like case a man might have his clergy, shall, for the first offence, be branded, and marked in the hand, upon the brawn of the left thumb with a hot burning iron, having a Roman T upon the said iron; the said mark to be made by the gaoler, openly, in the Court, before the Judge; and also to be

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further punished by imprisonment, whipping, stocking, or sending to the house of correction, in such sort, manner, and form, and for so long time (not exceeding the space of one whole year) as the Judge, Judges, or other Justices, before whom she shall be so convicted, or which shall have authority in the cause, shall, in their discretion, think meet, according to the quality of the offence, and then to be delivered out of prison for that offence, any law, custom, or usage to the contrary notwithstanding."

This statute, at least, excludes all colour of reference to 1 Edward VI. Any woman convicted of grand larceny (if it be but a simply felony, clergyable in a man) shall be burnt. She was not put to demand benefit of the statute; to pray her clergy would have been too absurd; but, the larceny being stated in the record to be committed by a woman, judgment was forthwith entered of burning, and so forth. The statute is, moreover, confined to such larcenies where, in the like case, a man might have his clergy. I take notice of these words at present only for the sake of remarking that, in this statute at least, they must relate to the quality of the offence, not to the condition of the offender.

My Lords, the only statute of which the prisoner can claim the benefits against judgment of death is 3 & 4 William and Mary, c. 9, f. 6, which runs in these words: "And whereas, by the laws of this realm, women convicted of felony, for stealing of goods and chattels of the value of ten shillings and upwards, and for other felonies, where a man is to have the benefit of his clergy, are to suffer death; be it therefore enacted and declared by the authority aforesaid that where a man being convicted of any felony, for which he may demand the benefit of his clergy, if a woman be convicted for the same or like offence, upon her prayer to have the benefit of this statute, judgment of death shall not be given against her upon such conviction; or execution awarded upon any outlawry for such offence; but shall suffer the same punishment as a man should suffer that has the benefit of his clergy allowed him in the like case; that is to say, shall be burnt in the hand by the gaoler in open Court, and be further kept in prison for such time as the Justices in their discretion shall think fit, so as the same do not exceed one year's imprisonment." Under this Act, to avoid judgment of death, the prisoner must pray the benefit of this statute.

I collect from conversation, perhaps too idle to be referred to, that the argument will be laid thus. A woman convict of a felony, which would be clergyable in a man, shall suffer the same punishment as a man would do in the like case, that is, as a man of the same condition with herself, but a Peer would suffer no punishment; therefore a woman of that condition shall suffer none.

The words "in the like case" must mean the same here as

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in 21 James, "convicted of the like offence." And the words "of the same condition" must be wholly superadded, if they are admitted at all. But it is impossible to conceive that, if the Legislature had meant to create so important a distinction between different orders of women, it would have used no words for that purpose. Nor, indeed, can such a distinction be so created by any operation of law.

If, in favour of the prisoner, the slightest degree of punishment, which any man can suffer in the like case, is to be intended, every woman would claim exemption from burning, because inferior ecclesiastics are not burnt; and from forfeiture, because Lords of Parliament are neither burnt nor forfeit. But this absurd construction happens to be thrown out by the Act itself, which appoints the punishment it means to be burning and imprisonment. The statute, therefore, will not suffer it to be understood that any woman convicted of any felony shall suffer no other punishment than those who, it is now contended, are to suffer no punishment at all.

Upon these grounds, I submit to your Lordships that the judgment to be pronounced upon every woman, of whatever quality or denomination, is that which is prescribed by 3 & 4 William and Mary, and that there is no ground or warrant of law to insist that a Peeress can avoid judgment of death upon any other terms.

My Lords, the whole question is upon burning. The imprisonment is the same either way. Now, if there be prudence or propriety of any sort in establishing such an exemption for Peeresses, let that prudence or propriety be stated where by the constitution of this country such an application ought to be made to Parliament. If the Parliament should think fit to create new privileges, or add new distinctions to any order of men, or women, they are competent to do it. But it would be assuming too much for any Court of justice. Your Lordships sit here merely as a Court of justice, not as a House of Legislature. To do that by forced and arbitrary interpretation of law, which ought only to be done by Act of Legislature, is too much enhancing the prerogative of the Judge, and too much confounding those authorities which ought to have plainer marks and broader limits set between them.

Mr. WALLACE—My Lords, I did not suppose it would have fallen to my state to give your Lordships any trouble upon this subject, and therefore I have not very lately looked into the statutes which have been mentioned; but I will state to your Lordships in general what I understand to be the privilege of Peeresses at this day.

By 20 Henry VI., c. 9, to obviate doubts which had arisen

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upon Magna Charta, Peeresses are put upon a footing with Peers with respect to trial and punishment, and, by an equitable construction, Peeresses by titles since created, as Marchionesses and Viscountesses, are within the Act.

At the time of passing the Act of Edward VI. the Lords of Parliament are mentioned, which at that time of day comprehended the whole Peerage. In this situation were Peers at the time of passing the statute of 18 Elizabeth, which statute cannot relate to them. Every person, who is to be admitted or allowed to have the benefit or privilege of clergy, should not after burning in the hand be delivered to the Ordinary, as has been customary, but may be detained in prison. This provision clearly refers to the situation of commoners, and not of Peers. It refers to those who were at the time of making the Act liable, whereas Peers were not in that condition; they were not to pray their clergy, but the benefit of that Act, and to be delivered out without burning in the hand. The direction given by the Act is to Justices. An expression never applied, I believe, in any Act to the Lords in Parliament sitting in their judicial capacity as a criminal Court. The Justices are to keep such persons in prison after they are burned in the hand, which is demonstration that inferior Courts are alluded to, and it is under this statute imprisonment is inflicted upon persons entitled to their clergy.

At the time of passing the statute of 3 & 4 William and Mary, Peers were exempt from burning in the hand and imprisonment in clergyable cases which commoners were subject to. By this law women are put on the same footing with men, and the Courts before whom they are tried are to inflict the same punishment as they are authorised to do upon men. These provisions make it, in my apprehension, extremely clear, that the Peeresses were intended to be placed in the same condition with Peers, as they were by Magna Charta, explained by the statute of Edward VI. Would it not be the most hard and cruel interpretation, if the Act was even doubtful, to subject a Peeress to a punishment for the same crime which her husband is exempt from? The conditions of persons create distinctions in the construction of laws; but the attempt now made is to confound all ranks, and by supposed literal interpretation to involve one of your Lordships' own situation in the punishment which the Legislature has been so anxious to extricate you from.

Mr. MANSFIELD—It is not till this moment that I had an apprehension myself that any question of this sort would be agitated before your Lordships, and therefore I can only speak of the several statutes referred to from my general memory of them, but I apprehend that the construction of these statutes will not, cannot be, such as is now contended for on the part of the

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prosecutor. The object of the construction wished by the prosecutor is this, that the laws of the country are to make a difference between one sex and the other; that they are now at this time of day to be so determined as to inflict a more severe, a more cruel, punishment upon a woman than on a man, though the offence committed be the same. Now, such a construction your Lordships would never suffer, nor any Court of justice in this country would suffer to take place, unless there should something be found in the law which necessarily requires it. And, taking the several statutes together relating to this subject, I apprehend your Lordships will be of opinion that these statutes do not only not require, but that they exclude, such absurdity, such inhumanity.

The statute upon which the whole must be founded, as I conceive, is that of 20 King Henry VI., which, as well as I recollect from my memory, is c. 11, which first provides expressly, though I believe it is considered only as a declaration of the common law, but provides that Peeresses should be tried, and, if I recollect the words rightly, should not only be tried, but should be judged in the same manner as Peers; and, remembering what has happened upon that statute, I must put your Lordships in mind that such has been the benignity of the construction upon it that, though only three ranks of Peeresses are named, it has been clearly held in construction to extend to all. The three that are mentioned, I think, are Duchesses, Countesses, and Baronesses; the construction is that it extends to Marchionesses and Viscountesses, because they are entitled in the spirit and meaning of the law to the same privilege which is given to the other ladies by name. The clear result and effect of this statute is, to say in general terms, that women of that high rank should be tried and should be judged in the same manner as men. The terms used in the Act are general. Whoever reads that law will be astonished to hear any man contending that in imposing judgment upon a Peeress your Lordships are to be guided by a different rule from that which you would follow if you were passing judgment upon a Peer. The next statute to be considered after this, as a general statute, upon the subject is that of 3 & 4 King William III. Did that statute mean: were the legislators who made it so forgetful of what was due to humanity, and to themselves and their own characters, as to mean, that a distinction in punishment should prevail between one sex and the other to the prejudice of that which is entitled to the greater indulgence and compassion? Most certainly not, because the express provision of that statute is that women convicted of offences entitled to the benefit of clergy should suffer in the same manner as men would suffer convicted of the same offences.

No man who can read that statute, and reason upon it, can

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help concluding that it was the object of that law to say that, where women were convicted of clergyable offences, they should be in as good a situation as men who were convicted of the like.

Taking the two statutes of 20 Henry VI., providing for the trial and judgment of Peeresses, and the general statute of 3 & 4 William II., giving the benefit of clergy to women, I should think it impossible to say that Peeresses convicted of a clergyable offence were not to have precisely the same privileges as Peers convicted of such offences.

If there be any rule of construction in the law, which is indisputable, for expounding statutes, it is this, that statutes, as we say, *in pari materia*, relating to one subject, are to be considered as one law, taken and interpreted together as throwing light one upon the other. No rule of construction is better established. Follow that rule of construction here. Take, first, the general law for the trial of Peeresses and the judgment of Peeresses in the same manner as of Peers; then take the general law giving the benefit of clergy to women in the same manner as to men, and who will not say that the rule of construction does not necessarily tend to put both upon the rank of men and women, in the same condition, when convicted of the same species of offence? But what are the particular Acts of Parliament which have been referred to as requiring a different construction? By 1 Edward VI. it is extremely clear that Peers are not to undergo the ignominious punishment of burning. The statute that follows that of Edward VI. is 18 Elizabeth, which takes away the delivery to the Ordinary, substitutes burning in its place, and then gives a power to imprison. Whoever reads that Act will see that it certainly was confined to cases where punishment was to be inflicted by Justices upon persons of an ordinary description, not persons of the rank of Peers; and the statute strictly and clearly relates only to persons so having clergy allow, as is prescribed by that statute. And if 18 Elizabeth is to have the construction which is contended for, I understand it must have effect also to inflict the punishment of burning upon Peers. So much, my Lords, for the statute of 18 Elizabeth. The 21 King James was mentioned as first, in part, giving clergy to women. 3 & 4 King William III. is mentioned as alluding to it; it does so, but the provision of 3 & 4 King William III. is general, that is, a general law extending the benefit of clergy to women in all cases. Now, it is said there that they shall have the same punishment as men; they are to be in the like situation as men. Then the Act goes on to say, that is to say, burning and imprisoning.

My Lords, what is the fair construction of this law? Why, that women shall be in the same situation as men, and where men are of such condition that they would be burnt in the hand, that they would be liable to be imprisoned, women in like manner

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should be subject to burning in the hand, and should be subject to imprisonment. But no one ever heard that the severe part of a law inflicting a punishment should be extended so by construction where it was not so express. Now, you must act against the clear provision of that law, that women should be in the same situation as men, if you were to say, that a Peeress convicted of a clergyable offence should either undergo the punishment of burning or the punishment of imprisonment. No one can say upon the statute of Edward VI. that they are subject to either. The object of the statute of William III. was to make the punishment for such offences precisely the same with regard to one sex as the other, and the true spirit and great object of that law must be directly acted against if a Peeress was to be put in a different situation than a Peer, and to have a more severe and cruel punishment inflicted upon her than would be upon him. These are the only general observations that occur to me now in taking the whole scope of the law. I therefore submit to your Lordships that the noble lady at the bar is entitled to the benefit of these statutes.

The ATTORNEY-GENERAL—My Lords, concerning the point which is now depending before the House, I fairly confess that when your Lordships first called upon me to give my reasons why judgment of death should not be suspended upon the prayer of the prisoner, made in the manner in which that prayer was conceived, and upon the effects and consequences of allowing her the benefit of the statute in a more regular course, I would rather, if I might, have been excused from laying my thoughts before your Lordships. I had heard a rumour that men, whose learning and authority I greatly reverence, held a different opinion. This would not fail to raise much distrust of my own conclusions, although I had thoroughly considered the subject, and although I never read any proposition with more perfect conviction of the truth of it since I learned to read.

My Lords, that idea—the only one I have been able to form or adopt—is now very much strengthened. That cloud, which came over it from the rumoured prevalence of contrary notion, is very much removed. Because, if there be no opinion to the contrary but what is to be founded on the argument, I have heard to-day from those who are best able to sustain the contrary opinion, I am perfectly satisfied, it is impossible this should pass as a point of law, or receive the sanction of your Lordships' concurrence.

My Lords, what are the arguments? First, it is utterly inconceivable that the law should put such difference between the two sexes. My Lords, if the subject was laid by for a moment, only to make a handsome compliment to a very respectable part of this assembly, which well deserves all the attention it commands,

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it is impossible to quarrel with a turn of gallantry. But, resuming the subject, we are all agreed that the law did actually put that very difference between the sexes for many centuries. And this uncourtly statute of Edward VI., proceeding upon the law as it found it, did not think of abolishing the distinction. It was quite beside the purpose of that Act, which did not mean to qualify the severity of the criminal law in general, much less to make an equal distribution of it among the subjects at large. But, taking the law as it stood, it was found inconvenient, incompatible, and shocking-to-reason that Lords of Parliament, who were to give their voices upon the most arduous affairs of a great Empire, should do so under apparent stigmata and circumstances of open infamy. I don't rely on the gender of the words, but on the purpose of the Act. Women are excluded by both. They were neither liable to the stigmata, nor held the high office which held them intolerable. Therefore, Bishops, whom 28 & 32 Henry VIII. had, at that time, made liable to the whole case of other clerks convict, were included. Women certainly were not. The privilege was given, not to the Peerage, but to the House of Parliament, to be claimed by the members as such. It was not substantive, but an ingraftment on the right to clergy, which women never had. In truth, I have not heard a hint from the counsel on the other side to question the existence of this difference down to 3 & 4 William and Mary upon which Act they have chiefly relied in argument. They lay it down that Peers convict of clergyable crimes are exempt from all punishment, not being within 18 Elizabeth; that Peeresses are to be tried and judged like Peers; that 3 & 4 William and Mary puts women convict in the same condition as men, and that by some tacit reference to the former statutes Peeresses convict are not to be punished at all.

I have troubled your Lordships already with my reasons for thinking that in old time Peers enjoyed the benefit of clergy in common with other men, and upon the same terms; that in 4 Henry VII. burning was inflicted upon them as lay clerks; that the statute of Edward VI., in the very moment of exempting them from the penalties incurred at law by conviction, adjudges them clerks, and delivers them for purgation in the Bishops' Court; that the statute of Elizabeth delivers all who shall thereafter be admitted to clergy from purgation, and discharges them, subject to such correction by imprisonment for less than a year as the Court shall think fit.

It is not denied that these words, in their plain and natural sense, embrace the case of Peers. But in this context it is supposed they do not, because the clerks convict are to be discharged after allowance of their clergy, and after burning in the hand according to the statute. This last provision, they say, cannot refer to Peers. Nay, one learned gentleman thought that, if it should be

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construed to include Peers, they must, by force of these words, be burnt in the hand.

I cannot follow this idea. I have no way of conceiving how an Act which inflicts, or rather reserves, a penalty, according to the law as it then stood, can be interpreted to create a new penalty, or by what chain of reasoning it is concluded that where all convicts are to be discharged upon the allowance of clergy, and such burning as the law directs, those are not to be discharged at all for whom the law has not directed burning. Suppose the King should pardon the burning, it was thought in Lord Warwick's case that would be a perfect discharge. Burning was not substituted in the place of purgation. That was a mere slip. It is contrary to the history. Burning existed before 18 Elizabeth, in just the same extent as after. Imprisonment, at the discretion of the temporal Judge, was the substitute for purgation, and is extended expressly to all who are discharged from purgation. But it seems too late to argue this. Was it not expressly decided in the case of *Searl v. Williams*, when prohibition went to stay the deprivation of a parson who had been convicted of manslaughter, and discharged under 18 Elizabeth, although he could not be burnt? "For when the statute says after burning, it imports where burning ought to be, otherwise the statute would do no good to clerks for whom it was most intended." The case is reported in Hobart. The statute speaks universally of everybody, those who were, and those who were not, liable to burning, and discharges them all, after allowance of clergy, and burning according to law, as it had stood before, that is, *reddendo singula singulis*.

The next objection is that the word Justices will not apply to your Lordships, even while you are sitting merely in the characters of Judges. Therefore, a statute which is to be executed by Justices cannot relate to a Peer, who is not triable by Justices.

Is it then seriously contended that your Lordships, exercising your jurisdiction in the trial of a Peer, will not do all the same acts of justice which Judges must do in the trial of a commoner? Upon reading many Acts of Parliament, your Lordships will find either that you have no jurisdiction at all, or that you must exercise it under the character and denomination of Justices. The same objection might have been made to Lord Ferrer's execution; the same to the burning a Peer under the statute of Henry VII. By the word Justices I understand, in our law, all manner of officers who are entrusted with the administration of justice. So Spelman defines the word. In high antiquity the name went to the greatest subject in this country, for I take the *justitia totius Angliæ* to have been above the *seneschallus regis*. Your Lordships, therefore, will not disdain the name, for you sit here in no higher character than that which, by just and natural construction, is

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attributed to the word Justices. Therefore, if no better objections can be raised than these, I apprehend the words of the statute sufficiently comprise the Peerage. This also was laid down in the trial of Lord Warwick.

But, my Lords, if these are objections, whither do they go? Not only to subvert the statute of Elizabeth, in this most reasonable particular of giving some convenient correction, as the statute calls it, to a criminal found so upon record, but to restore a law which has now for many ages been understood to be at an end, and I flatter myself, considering the account which the books all give of it, that purgation is at an end.

But I am called upon to look at 20 Henry VI. c. 9. This was a mere declaratory law, reciting the 29th chapter of Magna Charta, *nullus liber homo*, and so forth, and a very absurd doubt whether homo included both genders, and declaring that, "Ladies shall be put to answer, and judged before such Judges and Peers" (here, by the way, Judges and Peers are synonymous) "as Peers should be." But though by Magna Charta Peeresses were to be tried by their Peers, as other women were by theirs, there the privilege ends. All were, upon conviction, to receive the like judgment and execution. And, in the exemption from death, the difference was not between the ranks, but the sexes, of the convicts. And so the law undoubtedly continued, notwithstanding this statute.

But it was said that by the equity of this statute Marchionesses and Viscountesses were included, though not named. This was to give countenance to the rule that all statutes *in pari materia* shall be construed alike. There is great good sense in the rule, Marchionesses and Viscountesses were clearly within the law declared, and consequently within the reason of declaring it. Therefore Duchesses, and Countesses, and Baronesses were, by a sort of synecdoche, put for all Peeresses. So where a privilege is saved to certain denominations of people, all others, who were before within the same privilege, will be within the saving, if there be nothing in the context to raise a distinction against them, particularly if the saving be only declaratory, and not a positive exception. Nay, in a new law things equally within the reason of it have been comprised in it by construction. But this borders upon arbitrary. Parliament seems the most proper judge of this reason. If Peers, disqualified to vote, should claim the benefit of 1 Edward VI., it might be argued with some plausibility that they are within the reason of the Act. They are so certainly in every point, except that of voting, and yet I should think it too much to overlook so material a distinction made by the statute itself. But if women, who were not concerned in any part of the subject-matter, make the same claim, it would be making a perfectly new law to include them. Where, then, is the

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paritas materia between the Act of William and Mary, for exempting women from capital punishment, and 20 Henry VI., which had nothing to do with punishment, or 1 Edward VI., which had nothing to do with women?

I did propose two statutes to be considered *in pari materia*, the Acts of James and of William and Mary, the only two which confer upon any woman any exemption from capital punishment. I have not heard it denied that if a Peeress had stood convicted of the crimes mentioned in the first Act, the punishment there specified must have ensued. This fixes the sense of these words in the like case. I am possessed, therefore, of this ground that the Act of Edward VI. did not touch the difference put by the law of clergy between the sexes, nor that of James make any difference as to the quality of the offender. We go entirely upon the Act of William and Mary. It is inaccurate to say this Act puts women into the same condition with men, and, still more, with men of the same quality respectively. There is nothing in it about the condition of the person. Where a man, convict of any felony, has clergy, a woman, convict of the like offence, shall not have judgment of death, but suffer the same punishment as a man would suffer, with clergy in the like case. These words refer altogether to the quality of the offence. That very crime, which is one record applied to a man, infers judgment of death, avoidable by his claim of clergy, applied in another to a woman, infers the specific judgment prescribed by the Act. Nor are the two sexes put into the same condition, even as to punishment. All women avoided judgment of death; not so of all men. Some were indispensably incapable of Holy orders. Such cannot have their clergy at this day, nor had any other exemption from death before 5 Anne. Some could not prove their title to clergy by reading. Men could have their clergy but once; women the benefit of this statute *toties quoties*, till a subsequent Act altered the law in this respect.

Still less can the words be twisted to create a difference as to rank of the offender. It is hard, says a learned gentleman, to put the severest construction upon an Act of this sort. The Act is not penal. But the shorter answer is, there are not two constructions to choose between. If the phrase had been left general, "the same punishment, as a man should suffer that had his clergy, in the like case," it might have been thought uncertain what that punishment should be, because different orders of men were liable to different measure of punishment, in the like case; the bulk of men to forfeiture, burning, and discretionary imprisonment; inferior ecclesiastics to forfeiture and imprisonment; Lords of Parliament to imprisonment only. In such a text there might have been room to contend for a favourable construction, and yet, even then, I should have thought that the

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measure of punishment allotted to the bulk of mankind, undistinguished by peculiar privileges, must have been deemed the meaning of the Legislature. But whatever might have been the construction of such a text, it must have applied equally to all women. They could not have been classed in castes, according to the condition of their respective husbands; the wife of a Lord of Parliament to be imprisoned; of an inferior ecclesiastic to be imprisoned and to forfeit; of other men to be imprisoned, to forfeit, and be burnt. The statute, however, has put an end to all question by stating expressly the very measure of punishment allotted to all women.

Burnt in the hand in open Court, it is said, shall not apply to Peeresses, because they were never liable to be burnt at all. The position is true, not of Peeresses alone, but of all women. But they were liable to judgment of death, for which this slighter punishment was a desirable commutation.

If there be anything in the nature of the punishment unreasonable, or improper to be applied to women in general, or to noblewomen in particular, let the matter come before Parliament. It is a legislative consideration, and Parliament will entertain it according to the extent of the principle, which certainly will apply to many noblewomen of much higher rank than some Peeresses who, as the law now stands, are liable to that punishment. So, I think, they ought to remain. Guilt levels rank. A noblewoman, covered with the ignominy of such a conviction, cannot forfeit less than her estimation.

The only question is this, has any positive law granted the exemption now demanded, to wind up such a record as this with perfect impunity, a ridiculous disgrace to public justice? Has this been done in express terms, or in terms whose necessary construction amounts to express?

When I have qualified the question in that manner, I have gone to the verge of judicial authority. And I do desire to press this upon your Lordships as a universal maxim: no more dangerous idea can creep into the mind of a Judge than the imagination that he is wiser than the law. I confine this to no Judge, whatever be his denomination, but extend it to all. And, speaking at the bar of an English Court of justice, I make sure of your Lordships' approbation when I comprise even your Lordships, sitting in Westminster Hall. It is a grievous example to other Judges. If your Lordships assume this, sitting in judgment, why not the King's Bench? Why not Commissioners of Oyer and Terminer? If they do so, why not the Quarter Sessions? Ingenious men may strain the law very far—but, to pervert it—to new-model it—the genius of our constitution says, Judges have no such authority, nor shall presume to exercise it.

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The Lords then adjourned to the Chamber of Parliament, and, after some time passed there, the House adjourned again into Westminster Hall, when, after the usual proclamation for silence, His Grace the Lord High Steward addressed the Duchess of Kingston to the following effect:—

LORD HIGH STEWARD—Madam, the Lords have considered of the prayer you have made, to have the benefit of the statutes, and the Lords allow it you. But let me add that, although very little punishment, or none, can now be inflicted, the feelings of your own conscience will supply that defect. And let me give you this information likewise, that you can never have the like benefit a second time, but another offence of the same kind will be capital. Madam, you are discharged, paying your fees.

My Lords, this trial being at an end, nothing remains to be done here but to determine the commission.

LORDS—Ay, ay.

LORD HIGH STEWARD—Let proclamation be made for dissolving the Commission of High Steward.

SERGEANT-AT-ARMS—Oyez! oyez! oyez! Our Sovereign Lord the King does strictly charge and command all manner of persons here present, and that have here attended, to depart hence in the peace of God, and of our said Sovereign Lord the King, for His Grace my Lord High Steward of Great Britain intends now to dissolve his commission.

Then the White Staff being delivered to the Lord High Steward by the Gentleman Usher of the Black Rod on his knee, His Grace stood up uncovered, and holding the Staff in both his hands, broke it in two, and declared the commission to be dissolved; and then, leaving the chair, came down to the Woolpack and said, “Is it your Lordships’ pleasure to adjourn to the Chamber of Parliament?”

LORDS—Ay, ay.

LORD HIGH STEWARD—This House is adjourned to the Chamber of Parliament.

Then the Peers and others returned back to the Chamber of Parliament in the same order they came down, except that His Royal Highness the Duke of Cumberland walked after the Lord Chancellor.

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executors administrators and assigns for all the remainder of the term yet to come and unexpired and all other lands and tenements situate near the said house and the estate thereunto belonging and not otherwise disposed of by this present act unto the said A his administrators and assigns he and they paying out of the revenue thereof to Margaret Cramont daughter of Captain Cramont formerly one of Aid de Camp of General Oglethorpe an annual rent of one hundred pounds during her life with which I hereby charge the said house land and estate and I give her the same power of entry and seisin in case of non-payment for six months as is customary with respect to common rent charges bequeathed on real estates; the first six months payment to be made on the first quarter day on which rents are usually paid which shall happen immediately after my decease.

I give leave and bequeath the two fields or pieces of land situate between the land called the Duke of Rutland's land and the garden belonging to Kingston House unto B his heirs and assigns for the perpetual use of the said B his heirs and assigns.

I give leave and bequeath all the field or piece of land one part whereof is a kitchen garden situate between Kingston House and a house or farm and land now used as a boarding school unto L his heirs and assigns for the perpetual use of the said L his heirs and assigns And I give and bequeath all the furniture pictures china household linen fire arms kitchen and garden copper utensils and other things belonging to the said house kitchen garden stables coach-houses and other buildings unto the said A his executors administrators and assigns unto whom I have given the said house.

I give leave and bequeath all that capital house hen-house farm and domain ground and other lands meadows and pasture grounds called Hall situate in the parish of Harford in the county of Devon and all those houses lands and farms with their appurtenances called Luks Landford Barn and Dards Tenements in the said parish of Harford, containing one hundred and twenty acres of land or thereabouts with their appurtenances and dependencies and the ruined cottage and meadow called Oddacombe Meadow containing one acre of land and two other cottages houses places and gardens with their dependencies formerly in the possession of John Wort a or his tenant, one other cottage garden and inclosure in the possession of Thomas Pierce and likewise one moiety of the Lordship of Harford and a moiety of the right of patronage of the parish church of Harford and of the Marsh called Harford Marsh and all the other Estates now in my possession in the county of Devon with all the appurtenances and appendages (subject to an annual payment of fifty pounds from me to Mrs. Mason during her life who has lived in my house called Hall in different circumstances and has received the said rent-charge for several years and which is still paid to her and for which I charge my estates in the county of Devon and give to her the same power to be paid in the same manner as I have directed for the rent-charge herein above given to Margaret Cramond) unto Sir George Shuckburgh Baronet Sir Richard

Appendix.

Heron and George Payne of Brooklands in the county of Surrey Esq. their heirs and assigns with power to transfer the same to the use of C during his life and after his decease to the use of the first second and other sons successively of the said C in the male line and in default of male heirs of the said C or in case of there being any they should happen to die before the age of twenty one years then to the use of P during his life and after his decease to the use of the first second or any other son of the said P successively in the male line and in default of male issue of the said P or in case there should be any and that they should happen to die before the age of twenty one years then to the use of the Revd. John Penrose Clerk of Fieldborough in the county of Nottingham during his life and after his decease for the use of the first second and every other male child of the said John Penrose successively and in default of male issue of the said John Penrose or in case there should be any and that they should happen to die before the age of twenty one years then to the use of the Revd. John Donisthorpe of Corkney in the said county of Nottingham his heirs and assigns and I do hereby order that all and every person or persons unto whom I have bequeathed my said estates in the county of Devon³ shall be obliged to take the surname and arms of Chudleigh as soon as they shall have taken possession thereof and in default of conforming themselves thereto, the person remaining nearest shall be at liberty to take possession of the said estate and enjoy the same as if the person refusing was dead I do also order that trustees be appointed in such place as shall be thought necessary to preserve the contingent remainder, with power to the person in possession or the guardians of the children who shall have a right to the estate when they shall have attained the age of twenty one years to lease the same And I hereby give and bequeath all the furniture plate pictures china looking glasses linen, fire arms carriages waggons household utensils garden tools horses horned cattle annuity and all other things belonging to the houses park land gardens baths and appurtenances at Thoresby, Holm Pierepoint and all the other houses lately belonging to his Grace the Duke of Kingston deceased in the county of Nottingham or any other part of England (the county of Middlesex only excepted) unto the said Sir George Shuckburgh Sir Richard Heron and George Paine their executors administrators and assigns on condition of having them valued and estimated by two indifferent persons of the greatest skill and experience according to their different sorts and qualities and to offer them first to Charles Meadows of Esq. if he will make a purchase thereof at the price of the valuation and pay the amount thereof in five equal annual portions but if he refuses to accept of it, it shall then be publicly sold by the said trustees, their executors administrators and assigns, and the monies arising therefrom shall be received and retained by them; and if the furniture and other things produce the sum of fifteen thousand pounds or more this sum

³ The said estates in the county of Devon amount in the annual income to about one hundred pounds a year.

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of fifteen thousand shall be paid to Evelin Philip Meadows Esquire⁴ of Chaillot near Paris and the surplus be advanced by the said Sir George Shuckburgh Sir Richard Heron and George Payne their executors administrators and assigns on Government security the interest to be paid to the said Evelin Philip Meadows during his life and after his decease the principal shall be divided equally among his children with benefits of survivorship until twenty one years and the provision for their maintenance shall be taken in the actual manner out of the interests of the said securities but if the said Evelyn Philip Meadows should not leave any children it shall be paid and applied to the benefit of the children of the said Charles Meadows, his eldest son excepted, equally with benefit of survivorship and the usual administration for the maintenance of them as ordered with respect to the children of the said Evelyn Philip Meadows. But if the whole does not produce fifteen thousand pounds then the total shall be paid to the said Evelyn Philip Meadows and if it should so happen that the said Evelyn Philip Meadows should die before me, then the said produce shall be paid unto and divided amongst his children if more than one with the usual provision for their maintenance as herein before mentioned and if he leaves only one child the said produce shall be given to such child and if he should die without heirs it shall then be paid to the children of the said Charles Meadows, his eldest son excepted, in the same manner as to those of the said Evelyn Philip Meadows. And I also give and bequeath unto said Charles Meadows all the communion plate which belonged to the chapel of Thoresby and which were taken away with the other vessels and sent by mistake to St. Petersburg in Russia,⁵ and my gold desert plate with the case of knives forks and spoons of gold and four golden salt cellars all engraved with the arms of Kingston and also one large salt cellar called Queen Elizabeth's salt cellar together with all my other gold and gilt plate whatsoever, either for use or ornament and likewise the following plate viz. one large cistern with ornaments weighing 3606 ounces* two large silver vessels to put wine in with their pedestals and appurtenances one large cover one middle piece weighing 632 oz. 5 dwts. two large tureens with covers weighing 1342 oz. 5 dwts† and their dishes; two tureens with handles weighing 592 oz. 10 dt.—Two corner tureens weighing together 650 oz. 17 dt. two soup dishes weighing 171 oz. 19 dt. four ice pails weighing

⁴ These are the chattels bequeathed her by His Grace of Kingston, which, as her personal property, will, of course, occasion a contest on the part of the next-of-kin. The pretensions of Evelyn Meadows to this bequest are, to such a character as the Duchess, the best founded imaginable. He disgraced her by a prosecution, which finally exiled her. Like Charles II., she provided for enemies, leaving her friends to console themselves with the love of her good qualities.

⁵ To strip a chapel of the Communion plate, and pretend that the sacramental vessels could be sent from Nottinghamshire to Russia by mistake, is adding a lie to sacrilege. If it were possible that the Communion plate were sent to Petersburg by mistake, how came it not to be returned when the mistake was discovered? It is shocking to consider to what length the lust of avarice can impel the human mind. A chapel may be robbed, and the impiety of the deed may be termed a mistake.

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together 252 oz. 13 dt. two large cups weighing together 266 oz. 5 dt. two cups weighing 158 oz. 10 dt. six cups weighing together 278 oz. 8 dt. six cups weighing together 188 oz. 8 dt. two cups weighing 44 oz. 14 dt. two cups weighing 71 oz. 16 dt. four cups weighing 70 oz. 16 dt. eight cups plain round weighing 234 oz. 6 dt. eight deep round cups weighing 184 oz. four corner cups weighing 76 oz. 4 dt. six sauce boats weighing 128 oz. 19 dt. five dozen of plain plates weighing 1441 oz. 14 dt. and six dozen of wrought plates weighing 1437 oz. 13 dt.⁶—And I also give him my nine dozen of Moco handle knives and forks mounted in gold which I bought at Rome and likewise the whole length portraites of the late Duke of Kingston and of the present Duchess of Kingston to be put up at Thoresby which as well as all the plates shall be reputed as an heir loom of the said house; and I also give him the several pieces of cannon and the ships and vessel on Thoresby Lake all the copper fountain locks bolts bars bells and other furniture in and about the houses gardens stables and houses thereunto belonging to be reputed as appendages of the said house and I give and bequeath to Mrs. Meadows wife of the said Charles Meadows all my gold fillagree work plate toilette furniture together with all the ancient enamelled ornaments thereto belonging and all the cabinets and other pieces of japan ware all the gold and gilt plate and japan ware, are now at St. Petersburg, also my pearl necklace consisting of pearls with two drop pearls in the shape of pears strung at the two ends of the necklace and which belonged heretofore to the family of Kingston And I order that all the plate and the pearl necklace hereabove mentioned and given to Mr. and Mrs. Charles Meadows as aforesaid shall be carried and placed at Thoresby and that they shall enjoy the same for ever together with the house as an heir loom.

I give leave and bequeath my house situate at Montmartre or in any other place at or near Paris in the kingdom of France with the gardens and appurtenances unto Messrs. Girardot and Haller bankers at Paris on condition of their selling the same and paying out of the money arising therefrom to the Abbe Fillatrée now at the Prince Cardinal of Rohan's one thousand Louis-d'ors unto the said Mr. Haller six hundred Louis-d'ors to purchase a pair of diamond shoe buckles to Madam de Gross at Paris one thousand Louis-d'ors to Mr. l'Ekoufe of Paris five hundred Louis-d'ors to Mr. Becket de Moyceque of Calais second son of the late President Cocove⁷ one thousand Louis-d'ors and to pay to my trustees five hundred Louis-d'ors to be placed out at interest and pay the income to Mademoiselle Cafferiere a young lade of Calais—Sister of the late Mr. Cafferiere of the Custom-house during her life and after her decease to pay the principal to the

⁶ The specification of valuable articles is astonishing; and still more astonishing is the current language of one, at least, of the executors, that the Duchess died impoverished. How far a mixture of self-interest may cause such reports to be propagated is matter of consideration for the relatives.

⁷ The eldest son, who travelled with the Duchess to Rome, Petersburg, and other places, is commended by her good wishes to the care of Heaven.

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said Mr. Becket de Moyceque of Calais to purchase an annual rent of one hundred Louis-d'ors for ever for the benefit of the two schools at Calais for the education of all the children which shall be brought there for introduction according to the rules of those schools newly established and the rent to be paid one half each to each of the said schools, the receipts of the six brothers of the boys school and of the six sisters of the girls school shall be sufficient discharge and to employ⁸ a sufficient sum for building a prison for the prisoners of war and those for debt in order to keep them separate from the criminals; and if there should remain any money over and above these disposals they shall employ a sufficient quantity for the building of a water mill in a⁹ convenient place in the town of Calais for the use and benefit of the public (as at certain times when the wind fails the poor are liable to be without bread) which shall grind gratis for the poor on Mondays Wednesdays and Fridays under the inspection and direction of the mayor of the town, and lastly the remainder to be employed by Mr. Haller in brilliants for Mademoiselle Hougherot, none of the diamonds to be under the weight of one carat. I will that all the plate and other effects (the pictures excepted) which are in the house at Paris be sold by my executors the money arising therefrom to be placed out in government or other good securities and the interest thereof to be paid to Mrs. Donisthorne wife of the aforementioned Reverend John Donisthorne during her life and after her death the capital to be divided among her children in such manner and at such times as she shall direct by deed or testament in default of which disposal on her part it shall be divided among them in equal portions to be paid to them when they shall have respectively attained the twenty first year of their age with the usual power for their maintenance and benefit of survivorship if any of them die before attaining the age of twenty one years but if she leaves no issue then to such persons and in such manner or testament And I give leave and bequeath my hotel and the garden adjacent together with the stables dependencies and appurtenances situate at Calais in the said kingdom of France to the government of the said kingdom to be employed to make the resident of the commandant of the said town of Calais for the time being to be delivered after the furniture and fixtures shall be taken out together with the wines and liquors which are in the cellar¹ which are

⁸ The idea of erecting a separate prison for the debtors was suggested to the Duchess by Major Semple, who stated it to have been his principal sufferance to have had his feelings wounded by being liable to mix with rogues.

⁹ This jocular mode of converting the Mayor of Calais into a miller is altogether so suitable to the genius of the testator as not, perhaps, to occur to the mind of any other person in the universe. There is an air of lunacy which pervades the whole of the will.

¹ This cellar is in excellent condition as to what it contains, for there are about forty thousand bottles of different sorts of wine in it. The present commandant, having passed his grand climacteric, is not qualified to enjoy the pleasures of the cellars, but, should it fall to the lot of a *bon vivant*, it would prove a most acceptable bequest.

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to be left for the use of the first commandant who shall reside there—I give and bequeath the pictures in the gallery of the said hotel painted by Mignard to the Lord Mayor Aldermen and Commonalty of the City of London begging their acceptance thereof and that they would place them in the Egyptian hall of the Mansion House which the Lord Mayor of the said City for the time being inhabits.² I give and bequeath the remainder of the pictures and the furniture of the said hotel (the plate and household linen excepted) unto the said Sir George Shuckburgh Sir Richard Heron and George Payne their executors administrators and assigns to be sold by auction at the beginning of the month of May in the year next after my decease, and to regulate the accounts of Mr. Speake my maitre d'hotel in that town under the inspection of Mr. John Williams my maitre d'hotel at the hotel of Kingston and pay him the balance if any be due to him also to pay to each of my English domestics who shall be in my service at the hour of my decease the sum of twenty pounds each to pay the expenses of their passage and journey And I order hereby that the rest of the monies arising from the said sale shall be equally divided by the said Sir George Shuckburgh Sir Richard Heron and George Payne their executors administrators and assigns among the children of the sisters of the late Sir John Chudleigh with the usual powers for their maintenance and benefit of survivorship in case any of them should die before having received the legacies And I hereby order that the plate the silver urn excepted which shall be in my said hotel at the day of my decease shall be sent to my house at Knightsbridge called Kingston House for the use and behoof of the said A.

his executors administrators and assigns unto whom I have left the said house And I give and bequeath all the household linen to Mademoiselle Charles Meadows. I give and bequeath to Mr. Fry Dr. of Medicine at Rome who attended me during my abode in that City all my household linen the furniture pictures plate linen china and all the other goods and effects whatsoever belonging to me in the possession and custody of the Abbess of the Convent of³ of the said Doctor Fry and of Mr. Orlanderd Treasurer of the Jesuits her paying two hundred ducats to his said Mr. Orlanderd, or if he should be dead at the day of my decease to his widow if she is alive and I order that a catalogue be made of the printed music and books in the hands of the said persons at Rome and that the said printed music and the books together with a copy of the said catalogue shall be delivered to the Russian Minister then at this place for the use of General Fossoskie at St. Petersburg if living, but if he is dead for the use of his son—I give leave and bequeath my land called Chudleigh in the

² There are sixteen of these pictures, and very valuable they are; but whether they may ever come into the possession of the Corporation of London is, at present, a little problematical. The relations of the Duchess may think it quite as well to convert them into cash as to have them ornament the hall to which the Duchess, in a moment of folly, consigned them.

³ The property in the custody of this nameless Abbess, added to the other possessions at Rome, are estimated at two thousand pounds value.

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district of Motlic in the Russian empire, together with the house in which I reside and all other houses and buildings thereto belonging and all the forests mines quarries dependencies and appurtenances and all the furniture plate household linen china looking glasses and other things in and about the said house stables gardens and outhouses with the horses, peasants, annual and perpetual rents and other things belonging to the said land unto E his heirs and assigns for ever for which he shall pay within twelve months after my decease the sum of thirty thousand roubles to Mr. Muers my apothecary living there in one of my houses, and one tenth of the produce of all the mines whatsoever to such person or persons in favor of whom it shall please her Imperial Majesty graciously to dispose of the same to be by them had and received for their own proper use and I order that my four musical slaves⁴ and their wives bought of Mr. Douglas at Revel shall have their liberty six years after my decease and that there shall be paid to each of them thirty six roubles per annum to be paid out of the said land for the services they are to render to the person or persons to whom my land is bequeathed and unto their wives the sum of eighteen roubles per annum each.

I give leave and bequeath in like manner the piece of land at Schusselbourg a gracious gift made to me by her Imperial Majesty the Empress of all the Russias situate on the banks of the Neva and adjoining to the land of Prince Potemkin unto F and his heirs for ever And I give leave and bequeath all the land purchased of General Ismoiloff in the year 1785 called Casterbaback on the road of Czarsco Zello* with the houses gardens and dependencies unto G and his heirs for ever. And I give leave and bequeath my large house and other houses gardens and land at St. Petersburg bought of the said General Ismoiloff, unto H and his heirs for ever I give to the Countess of Gramont my large block enamelled ring set round with brilliants and having a large oval brilliant in the middle and I give to the Countess de Bosse my cornucopia set with brilliants one pair of ear-rings of emeralds round pear fashion, my large emerald ring set round with brilliants and an emerald cross and ribbon attached to it set round with brilliants and likewise all my emeralds. I give and bequeath my two fine music lustres at the house at St. Petersburg where I reside my fine organ mounted with engraved flass and precious stones set in gold and fillagree work with two tablets of Oriental alabaster to the Prince of as a small testimony of my remembrance and of his attention to me And I give and bequeath all my organs (except the above mentioned) and all my forte pianos and musical instruments of every kind all my music and the books of my library at St. Petersburg together with all my globes telescopes and all other optical instruments

⁴ Even in this manumission there is discovered a latent principle of tyranny; for the slaves are to be liberated for six years, and be afterwards in bondage during the remainder of their lives. As was said of Herod, that "it were better to be his dogs than his children," so would the condition of a coal-heaver have been preferable to that of Her Grace of Kingston's "Musical Performers."

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and all my clothes in the said house trimmed or lined with fur and all other furs made up or not made up in all the houses whatsoever which I have in Russia unto I And I give and bequeath all my china and looking-glasses whatsoever belonging to the said houses at St. Petersburg either ornamental or useful (the mirrors belonging to the houses excepted) and all the household linen that shall be found therein to the said Charles Meadows and I give all the carpets of the said house the coach horses the kitchen and furniture in and about the said house at St. Petersburg unto my executors as making part of my own proper estate. I give and bequeath likewise all the remainder of the furniture that shall be found in the said house at St. Petersburg unto the said K⁵ unto whom I have given the said house I give and bequeath as an act of justice to the said Charles Meadows to be reputed an heir-loom of Thoresby the two pictures which are in the possession of the Count de through the misunderstood interpretation of a letter which he received and which he maintains to have been presented to him viz. one of the said pictures known and attested by Carlo Marriot for an original of Raphael the Holy Family and the other a Claude Lorraine It is said in the said letter that these two pictures were much esteemed and admired by the late Duke of Kingston I set a great value on them and I trusted them to his care, the expression in French was "Je vous le confie" (I trust them to you) this circumstance can be attested by Major Moreau at that time my Secretary who wrote that letter signed by me, they have been demanded and refused several times and particularly once by my painter Mr. Le Sure who presented the request in writing signed by me.

I give and bequeath to the model of a sleeping figure the original whereof is now at Rome which was or is thought to have been seen at the said Comte de having been brought from Thoresby in Nottinghamshire by Moiett my gardener, who shipped it on board a ship which brought him and the figure to St. Petersburg where he himself delivered it and where he saw it often and for a long time in the court yard of the said Count before the house and during many months in the said Count's garden in a case without a cover, I have kept his attestation thereof copy whereof I annexed to this present act I order my executors and trustees to offer all the pictures of my house at St. Petersburg to her Imperial Majesty if she will accept of them, and pay for them unto my said executors the sum of one hundred thousand roubles⁶ and if her Majesty does not accept of them my executors shall be bound to offer them to the King of Spain and in case he should not accept of them they shall then cause them to be sent to England to be publicly sold there.

I direct and request the said Sir George Shuckburgh Sir Richard Heron and George Payne to offer and lay at the feet of her Imperial Majesty my pair of pearl ear-rings with my aigrette containing five red pearls and one large red pearl suspended from an Imperial crown of brilliants only

⁵ The nobleman here alluded to is Count Chernishoff.

⁶ About twenty-five thousand pounds sterling.

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worthy to be offered as the rarest jewel in the known world and the acknowledgment of a heart full of gratitude for the particular friendship with which her Imperial Majesty has always distinguished me.

I give and bequeath to his holiness the Pope a miniature picture representing the Holy Family by Raphael in a gold snuff-box incrusting with pebbles found in Saxony as an acknowledgment of his gracious protection and of the honour and favour he was pleased to shew me by preserving a very considerable property consisting of plate jewels and other things of value which were under his Holiness's care during three years that my persecution lasted which were well preserved and restored to me undamaged and without expences.

I give and bequeath unto the British Museum in Montague House Great Russel-Street Bloomsbury London my two large pearls set round with brilliants which are supposed to weigh 47 grains more than those pledged by the Dutch in England in the reign of the House of Stuart which were estimated too high to be purchased and also the snuff-box which appears to be chrystal and which is only Scotch pebble set round with diamonds and served as a case to a watch of Mary Queen of Scotland and was given by her to a friend on the scaffold in her last moments that it may remain among the curiosities in England.

I give and bequeath to the Right Honourable the Countess of Salisbury my pair of ear-rings of white pearls in the form of pears set with brilliants which anciently belonged to the Countess of Salisbury in the time of the reign of Edward who instituted the Order of the Garter and purchased by me of Mr. Matthew Lamb trustee of one of the House of Salisbury.

I give and bequeath my large diamond ring consisting of one stone weighing twenty-seven grains to the Earl of Hillsborough Baron in England as a small testimony of my acknowledgment for the constant friendship which he shewed me during the time of my troubles and persecutions.

I give and bequeath my large diamond button which I wore in my hat and a diamond loop to be purchased by my executors and worn therewith the diamonds to be of one carat each of the first quality English cut for his Grace the Duke of Newcastle.

I give and bequeath the fellow button to his Grace the Duke of Portland with a similar hoop to be purchased.

I give and bequeath to the Right Honourable Lord Viscount Barrington one thousand pounds for a solitaire ring. 7

I give and bequeath to the Right Honourable Admiral Barrington my frigate with all her sails apparel anchors and other things thereto belonging to be delivered to him after making her voyage from Russia to transport to England such necessary equipage and other things as my executors shall want to transport there and in case the frigate shall be by them demanded for that purpose; but this voyage shall be made within fifteen months after my decease.

I give and bequeath to the Honourable Mr. Daines Barrington of the Inner Temple London my antique cameo ring with the head of Cicero and every thing that may be found in my cabinet of natural history, and sundry

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loose parcels found in the rivers in different parts of the world and which are in a crystal box to appearance but is a Scotch pebble set with diamonds.

I give and bequeath to the Right Revd. Shute Barrington Bishop of Salisbury⁷

I give and bequeath to the said Sir George Shuckburgh Baronet my diamond shoe buckles.

I give and bequeath to Sir Richard Heron to be held and reputed as an heir-loom to him and his family my large pair of diamond ear-rings brilliants consisting of a single stone each.

I give and bequeath to my cousin Mr. Harry Oxendon who married Miss Peggy Chudleigh the youngest daughter of my uncle Sir George Chudleigh Bart. of the county of Devon to be held and reputed as heir-looms my set of brilliants and topazes consisting of a necklace one pair of ear-rings one ring one pair of shoe buckles in yellow topazes all set round with brilliants which (the shoe buckles excepted) were given to me as a present by the Electress Dowager of Saxony and a large pearl in form of a pea set round with brilliants and also a pair of shapes embroidered in brilliants for women's shoes and eight rare diamonds which served as trimming for a robe with the four foliages of brilliants dependent thereto to make a pair of buckles and I give him the sum of three hundred and twenty pounds to purchase thirty-two brilliants to make the large side of the buckles.

I give and bequeath to Mr. Chichester son of my cousin Mr. John Chichester and of Mary Chudleigh his wife and one of the daughters of Sir George Chudleigh to become and be reputed as heir-looms the twenty three diamonds⁸

I give and bequeath to my cousin Mr. Prideaux who married Miss Mary Chudleigh daughter of Sir George Chudleigh my large diamond breast knot which I usually wore in my hat which I desire may become and be reputed as an heir-loom. I hereby order my executors to lay out two thousand pounds in the purchase of an annuity for Elizabeth Chudleigh sister of the late Sir John Chudleigh to be paid to her and I give her a legacy of three hundred pounds.

I also give and bequeath to Miss Diana Chudleigh one hundred pounds for a ring.

I give and bequeath to Mrs. Strong my cousin who lives near Wrexham in the county of Wales the sum of five hundred pounds and all my rubies set with brilliants eight brilliant robe buttons my pearl necklace composed of six rows my sapphires and yellow brilliants consisting of one pair of ear-rings two sapphires for buttons two small flowers in form of daisies a

⁷ As the blank in this hocus-pocus medley, which Mr. Payne, one of the executors, has the kindness to call a "will," is not filled up, the Bishop of Salisbury must be content with the good wishes of his departed friend.

⁸ Among the number of diamonds which the Duchess bequeathed, it will be rather difficult for the executors to ascertain which were the twenty-three she intended for Mr. Chichester. Left to the choice of others, they may not be of the first water

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butterfly a saphire ring set with brilliants and a saphire pear set with brilliants to hang at the neck a solitaire ring yellow diamond a hoop ring all of which diamonds and precious stones I desire may be looked upon and reputed as heir-looms.

I give and bequeath to my Cousin Miss Elizabeth Chudleigh third daughter of George Chudleigh of the County of Devon the brilliant loops which I usually wore to the sleeves of my gown and a knot of brilliants with which I generally tie my morning gown and my large brilliant ring during their life and after their death I give them to some one of their sisters children to dispose of them.

I give and bequeath to my relation Mrs. Standard formerly Miss Mason the sum of five hundred pounds and also a large silver table engraved with the arms of Chudleigh a large silver coffee pot and a silver tea service in the form of an urn which is at Calais as heir looms.

I give and bequeath to Mr. Jeffery Chalut de Verin Farmer General in France all my pictures which shall be found in or about Paris and the sum of one thousand Louis d'ors to purchase a ring in my remembrance.

I give and bequeath to Mrs. Payne wife of the aforementioned George Payne my gold watch and chain set with small brilliants and my large usual ring which she will please to wear for my sake and to be given after my decease to the eldest daughter if she pleases.

I give and bequeath to the virtuous and honorable Mr. Komonski of St. Petersburg at the Chancery of Prince Potemkin in consideration of his respectful attachment and of the care he took of me during my voyage from St. Petersburg to France when he was sent with me by her most gracious Imperial Majesty the sum of fifty thousand roubles which legacy I order to be paid to him the year after my decease.

I give and bequeath to Mrs. Ann Hamilton a rent of two hundred pounds per annum during her life to be paid out of my personal estate.

I give and bequeath to my old and faithful servant John Williams the sum of four thousand pounds⁹ and to his wife who has been with me a great number of years the sum of five hundred pounds and to their son

⁹ To John Williams the Duchess has intentionally shown a grateful esteem for faithful though not the most honourable servitude. She styles him her old and faithful servant; he originally was one of her chairmen, when Miss Chudleigh; and, possessed of a head and heart equal to the schemes of his intriguing mistress, in a few years wriggled himself into the offices of butler and house-steward. These situations gave him some power in her household; being possessed of strong natural abilities, and without education, he was pretty well steeled against all virtuous principles when in opposition to his mistress's ambition; in truth, she was well seconded by such an agent in most of her plans, however base and dishonourable; nor could any person of ability or merit in her household retain her favour longer than it met with his pleasure or humour. Pretending to methodical principles, they served as a cloak for the meanest deceptions. Domestics of the revered and good old Duke, who had spent their best days in his service, soon experienced the consequence of his power; and he had the honour to discharge every one who was not sufficiently mean to be subservient to his views.

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and daughter the sum of three thousand pounds each and I desire the said Sir John Shuckburgh Sir Richard Heron and George Payne their Executors Administrators and Assigns to employ the sum of one hundred thousand livres in the purchase of an annuity on the heads of Speake and his wife¹ now my domestics in my house at Calais and on the head of the survivors to be paid to the said Speake and his wife during their lives by moities the moiety payable to the wife shall be for her separate use and her receipt shall be sufficient discharge and after the death of either of them the remainder shall be paid to the survivor during life. I also desire the said Sir George Shuckburgh Sir Richard Heron and George Payne their Executors Administrators and Assigns to employ the like sum of one hundred thousand livres on government or good securities and to pay the interest or dividend to Anthony Seymour my domestic now living in my house at St. Petersburg during his life and after his death to his wife during her life and after the decease of the survivor to transfer the funds or security in which this sum shall be placed to their child my god-son Evelyn Seymour when he shall have attained the age of twenty one years. And the interest on dividend shall be applied in the mean time for his maintenance and education but if the said Evelyn Seymour should happen to die before the age of twenty one years then I give it to the next child of the said Anthony Seymour and of his wife payable in the same manner as directed for Evelyn Seymour and so on in succession whilst there is a child of the said Anthony Seymour and his wife. And I give to the said Anthony Seymour or to his wife if he shall die before me to be paid in case they or the survivor shall render up my property of Saint Petersburg unto my Executors and with their consent the sum of two hundred pounds and I order that their wages shall continue to be paid to them until they shall be discharged by my Executors. And I give to my servant John Lilly five hundred pounds and I desire the said Sir George Shuckburgh Sir Richard Heron and George Payne their Executors Administrators and Assigns to employ the sum of one hundred thousand livres to purchase an annuity on the heads of the said John Lilly and his wife and on that of the survivor and to pay it to the said John Lilly during his life and after his death to his wife during her life. I order that this annuity be paid into the hands of the said John Lilly and his wife solely on their respective receipts to serve as a discharge and if either of them should sell or assign this annuity it shall then cease and shall be no longer payable to them but shall then lapse and become part of my personal estate. I desire my said Executors to advance the sum of six hundred pounds to be employed in the purchase of an annuity for the life of Alexander Berry my coachman and to pay it into his own

¹ The purchasing an annuity on the heads of Speake and his wife, without Christian names, is rather humorous. The husband happens to be of a lower degree than her ordinary carpenter, alluded to in page 134; true it is, he wears a head without genius or common sense—the head of his immaculate spouse, Sarah, poor woman, has often felt the weight of her mistress's fists; a most docile creature, sometimes in the character of housekeeper, cook, laundrymaid or kitchenmaid, as it suited the humour of her dear Duchess. So much for the heads of domestics.

The Duchess of Kingston.

hands during his life and his simple receipt shall be a discharge, and if he sells or assigns it this annuity shall cease and lapse to become part of my personal estate. And I desire my said Executors to purchase an annuity of fifty pounds per annum with a part of my estate during the life of Mr. Angel who lives with me as interpreter and to pay it him during his life.

I give and bequeath to Mr. Campbell son of Campbell Esq of Wales by his deceased wife formerly Miss Meadows daughter of Philip Meadows Esq Deputy Ranger of Richmond Park in the County of Surrey the sum of five thousand pounds And I give and bequeath to Mrs. Egerton of Salisbury in the County of Wilts widow a rent of fifty pounds per annum and after her death this rent shall be paid to her brother Lindsey, if living and I require and order my Executors to purchase an annuity of fifty pounds per annum for the said Mrs. Egerton and Mr. Lindsey if they shall be living at the time of my decease and to pay it half yearly to them or him as above but if one of them only shall be alive the same annuity for the life of the party then living shall be paid half yearly to him or her as the case may be And I hereby desire my Executors to call on Mr. Samuel Cox² jeweller of Shoe Lane London and require him to pay what he is indebted to me as soon as his circumstances will permit without deranging himself leaving it to his known honor and conscience to pay it without being compelled by any security which he may have given me and which may be found in my possession at my decease and in case the said Charles Cox should die before he has paid it I make no doubt but his son or his representative will honor the said debt and when it shall be paid I order that it shall be divided in equal shares among the children of the said Mrs. Strong. With respect to all the residue of my estate after payment of my debts funeral expenses and legacies and all charges and expenses for the execution of my true will I order the said Sir George Schuckburgh Sir Richard Heron and George Payne their Executors Administrators and Assigns to apply this capital and employ it on good security and to employ the interests or dividends thereof if they amount to a sufficient sum on government or good security in such manner that it be for the life of the said Mr. Charles Meadows and General Meadows and at the decease of one of them one half of the interests shall be employed for the widow of the first dying during her life and at the decease of the other the other half shall be for the widow of the survivor of the said Charles Meadows and General Meadows and after the decease of one of the said two widows— One half of the principal shall be paid transferred and assigned over to the said Mr. Campbell son of the said Mr. Campbell and of his wife formerly Miss Meadows and after the decease of the other widow the principal of the other half shall be transferred and assigned over to the said Mr. Campbell.

And I hereby revoke all wills by me heretofore made and I constitute the said Sir George Schuckburgh, Sir Richard Heron and George Payne my

² The sum which Mr. Cox owed to the Duchess was two thousand pounds. She assisted him with the money in a manner that did her credit.

Appendix.

testamentary Agents and Executors and give to each of them one thousand pounds for the trouble they may have. And I order that in case the said George Payne should go from France to Russia to take possession and direction of my estate that over and above all the charges and expenses he may be put to and over and above the said legacy of one thousand pounds he shall be paid or shall retain the sum of two thousand pounds for his trouble in making that voyage :—

In Witness whereof I have signed my name on the first fifteen sheets of paper of the sixteen sheets of which this testament of my will is composed and on the sixteenth sheet I have signed my name and affixed my seal of arms this 26th day of October in the year of our Lord 1786.

(Signed) E. KINGSTON WARTH.

Signed sealed published and declared by the said Elizabeth Duchess of Kingston Countess of Warth the testatrix in the presence of us whose names are hereunder written and who have all signed our names in witness thereof in her presence and in the presence of each other. (L.S.)

Signed John Gregson, watchmaker to the King at Paris.
Verbecq jeweller rue St. Honoré at Paris.
Arthaud Secretary to the Duchess of Kingston.

3rd Piece.

CODICIL which I desire may be annexed and looked upon and considered as making part of my last will and testament and which I make in manner following viz. on a slip of paper annexed with a pin—I give to my Maitre d'Hotel Mr. John Pickin the sum of five hundred pounds.

E. KINGSTON WARTH.

4th Piece.

Chudleigh Haynes son of the Reverend Mr. Haynes Curate of St. Mary's Church in the said town of Nottingham.

Strong eldest son of the Reverend Mr. Strong and of his wife Ann sister of the late John Chudleigh of Chalmington in the county of Dorset.

Evelyn Philip Meadows

The enamel cross with its string.

Not to forget to send to Chudleigh at Petersburg the case of China.

On the back is written

Alphabetical Table containing the Letters and the names to which they refer.

When her Grace (her Highness) wishes to fill up the blanks conformable to the letters, she will please to write the names against the letters which will afterwards serve her to find those she wishes to put in the said blanks.

The Duchess of Kingston.

5th Piece.

MODEL OF CODICIL.

I desire that a codicil may be annexed and taken and regarded and making part of my last will and testament, and I make it in manner following, viz.

I give to John Barnard of Pall Mall London Esq. my diamond ring which I had given by my will to Mr. Alexander Ross, who is since dead.

E. KINGSTON WARTH.
this 1st January, 1787.

I give to Mrs. La Touche of Paris the pearl ear-rings and necklace which I usually wear.

E. KINGSTON WARTH.
the 10th May, 1787.

I give to Mrs. Johnson of Chudleigh in the county of Devon one thousand pounds.

E. KINGSTON WARTH.
the 21st August, 1787.

I desire to be buried in the following manner, viz. to be embalmed, and if I die in Russia, I most humbly beseech her Imperial Majesty to permit that I may be privately buried in such place and in such manner as it shall please her Majesty to order, wishing and desiring that it may be in the same province where she herself may will my body to repose, when my heart has been with her this long time, but if I should die near England I desire that my body be transported without pomp and buried in the Church of Chudleigh, where I will that a handsome monument be made and erected, for which purpose I order my testamentary executors to lay out the sum of five hundred pounds.

If the plate and the other effects given to Mr. and Mrs. Charles Meadows as heirs shall appear and be delivered entirely I desire Mr. Meadows to pay 100L. to Mr. Superieur, her Grace (her Highness) has a legacy to insert for Mr. Pickin.

ATTESTATION to add to the Codicil in case there should be a gift of land.

This Codicil was signed published and declared by the testatrix her Grace (her Highness) the Duchess of Kingston in presence of us who in her presence and in the presence of each other have signed our names as witnesses attesting the same.

CLAUSE OF REVOCATION.

A and B having behaved essentially ill to me, I revoke the legacies which I gave them by my will and I give and transfer those legacies (or such as your Grace (your Highness) pleases to grant to C and D.

Appendix.

On the back is written

MODEL OF CODICIL.

N.B. The whole of the gifts by codicil ought to be written in her Grace's (her Highness's) own hand and not by any other person and likewise the orders, such as those of her funeral, if it shall be her Grace's intention that they be inserted in the codicil, they ought to be so done with her own hand.

If her Grace (her Highness) shall make a specific legacy as of a ring, breast knot or any other of her personal effects, or of a sum of money, if it be written with her own hand there is no need of witnesses, if any other person writes the legacy her Grace will sign it and there must be two witnesses.

If she gives any land there must be three witnesses, and the attestation must be couched in the terms of the above model.

6th Piece.

LETTER TO MR. JOHN CHICHESTER.

Sir,

It is now several years since I had the honor to see you at the time of your voyage to Italy I was in hopes of having that pleasure again as being so near when you was at Calais. Let me have the pleasuring of seeing you at Calais if your affairs will permit of at Paris where I now am—Mr. Weriam whom I have seen at Paris has given me the most agreeable news of your health. Is your son alive? and in what part of the world? I should feel a great pleasure in meeting with him to shew all the regard due to him as your son. If you determine to do me the honour to come and see me at Calais, 'tis a long way by land and short by sea by making the Strights; if you make the journey by land, I wish you would send for our cousins the sisters of the late John Chudleigh to Chalmington near Dorchester and speak to them there are two of them who live in that county in a small retreat, the second has inherited a legacy of 20,000L. left her by a relation she lives in tranquillity in that ancient family seat, where she takes a pleasure in educating the children of her deceased sister who married Haynes a clergyman to whom I have given benefices amounting to 6 or 700L. per annum, and who has since been married to a Miss Tempest who has had a brother dead lately—This event has caused a large inheritance to fall to the children of the second marriage; added to the desire of seeing you is that of speaking with you on family affairs as likewise with Mr. Prideaux, whom I don't know where to seek for.

SKETCH OF THE LETTER TO THE POPE.³

Copy of the Translations made by Hainj Translator and Interpreter in execution of an ordinance of the 26th August last, by us collated on request

³ A most curious interlineation in a will! It is a pity that Her Grace (Her Highness) had not filled up this "Sketch of a letter to his Holiness."

The Duchess of Kingston.

as set forth in our ordinance of the 5th Sept. inst. and found conformable to the originals of the said translations at Paris in our Hotel this 9th September, 1788.

(Signed) ANGRAND with PARAPHE.

The originals of the said testament codicils and their covers in the English language after having been unsealed by Mons. Denis Francois Angrand D'Alleray Knight Count de Maillis Lord of Bazoches Condé St. Libiere and other places Lord Patron of Vangizard les Paris King's Counsellors in his Councils Honorary in his Court of Parliament ancient Attorney General of his Majesty in his great Council Lieutenant Civil of the City Viscountry and Provostship of Paris and Counsellor of State in his Hotel, and a copy of the translation which was made thereof by the said Mr. Hainj King's Interpreter in the Hotel and by virtue of the ordinance of the said Lieutenant Civil the whole composing seven pieces with the translation of the English papers were committed by the said Lieutenant Civil to the said Mr. Rouen one of the King's Counsellors Notary at the Chatelet of Paris here undersigned according to the verbal process of the opening translation and commission of the said testament codicils the letters bearing date the commencement of the 26th of August 1788 the day of the death of the Duchess of Kingston and closed the 9th of this present month of September.—The said testament codicils and letters comptrolled and examined at Paris by Lezen this 13th of the said month of September of the said year 1788 all remaining in the possession of the said Mr. Rouen, Notary.

Sixteen words erased as null.

(L.S.)

ROUEN.

Sealed the day and
year aforesaid.

Paulimuie.

